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March 28, 1995

Title: Brotherhood of Locomotive Engineers, et al., Petitioners
v.
Atchison, Topeka and Santa Fe Railroad Company, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Mann,Lawrence Moses

Counsel for respondent: Johnson,Ronald M., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 28 1995	G	Petition for writ of certiorari filed.
3	Apr 26 1995		Order extending time to file response to petition until May 5, 1995.
4	May 1 1995		Order further extending time to file response to petition until June 2, 1995.
5	May 1 1995		This extension is granted for all respondents.
10	May 9 1995		Supplemental brief of petitioner filed.
6	May 10 1995		DISTRIBUTED. May 26, 1995 (Page 1)
7	May 24 1995		Brief of Federal Respondents in opposition filed.
8	May 31 1995		REDISTRIBUTED. June 16, 1995 (Page 1)
9	Jun 2 1995	X	Brief of respondents Atchison,Topeka and Santa Fe Railway Company, et al. in opposition filed.
11	Jun 19 1995		Petition GRANTED.
			**********
12	Aug 3 1995		Brief of petitioners Brotherhood of Locomotive Engineers, et al. filed.
13	Aug 3 1995		Joint appendix filed.
14	Aug 18 1995	G	Motion of the Solicitor General for divided argument filed.
16	Aug 25 1995		Order extending time to file brief of respondent on the merits until September 20, 1995.
17	Sep 5 1995		Record filed.
		*	Original record proceedings U.S.Court of Appeals/Seventh Circuit and Federal Railroad Admin. Agency record (BOX)
18	Sep 11 1995		CIRCULATED.
20	Sep 11 1995		SET FOR ARGUMENT FOR MONDAY, OCTOBER 30, 1995.(2ND CASE)
19	Sep 13 1995		Motion of the Solicitor General for divided argument GRANTED.
21	Sep 20 1995	X	Brief of respondents Atchison, Topeka and Santa Fe Railway Company, et al. filed.
22	Sep 20 1995	X	Brief amicus curiae of Association of American Railroads filed.
23	Sep 20 1995	X	Brief of the Federal Respondents filed.
24	Oct 20 1995	X	Reply brief of petitioners filed.
25	Oct 30 1995		ARGUED.

1pp

Supreme Court, U.S.
FILED

No. 94-1592 MAR 28 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether compulsory time spent waiting by a train crew for deadhead transportation is "on-duty time" under the Hours of Service Act.

LIST OF PARTIES

The following parties appeared before the Court of Appeals:

Petitioners:

Brotherhood of Locomotive Engineers and
United Transportation Union

Respondents:

The Atchison, Topeka and Santa Fe Railroad Company,
Burlington Northern Railroad Company,
Consolidated Rail Corporation,
CSX Transportation, Inc.,
Illinois Central Railroad Company,
Norfolk Southern Railway Company,
Norfolk & Western Railway Company,
Southern Pacific Transportation Company, and
Union Pacific Railroad Company.

and

Federico Pena, Secretary of Transportation,
Department of Transportation,
S. Mark Lindsey, Acting Administrator, and
Federal Railroad Administration

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Brotherhood of Locomotive Engineers and the United Transportation Union, respectfully petition for this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The ruling at issue here, of the United States Court of Appeals for the 7th Circuit, *en banc* is attached hereto (Appendix 1a-20a; hereinafter "App. —"). The ruling

of the three judge panel for the Seventh Circuit, originally affirming the decision of the Federal Railroad Administration is attached hereto at App. 21a-28a.

JURISDICTION

The *en banc* decision of the United States Court of Appeals for the 7th Circuit reversing the ruling of the three judge panel was entered on December 28, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Hours of Service Act (hereinafter "HSA"), provides in pertinent part:

> § 21103. Limitations on duty hours of train employees
>
> (a) GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—
>
> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.
>
> (b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:
>
> (1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.
>
> (2) Time the employee is engaged in or connected with the movement of a train is time on duty.

> (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.
>
> (4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.
>
> (5) An interim period available for rest at a place other than a designated terminal is time on duty.
>
> (6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.
>
> (7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:
>
> (A) a casualty.
>
> (B) a track obstruction.
>
> (C) an act of God.
>
> (D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee left the designated terminal.
>
> . . . .

49 U.S.C. § 21103 [1]

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[1] Formerly contained in 45 U.S.C. § 61(b) and 62(b).

STATEMENT OF THE CASE

This case presents a classic example of a matter that warrants certiorari to be granted. There exists a split in two federal circuits on the interpretation of a federal statute, and it involves a serious railroad safety issue.

The genesis of this litigation arose in 1990 when the affected rail unions brought suits in the district courts of Oregon and the Northern District of California. Both cases were decided by the Ninth Circuit in the same opinion. *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992).

The Ninth Circuit, in a unanimous decision, held that the HSA was violated by requiring a crew to stay on a train awaiting deadhead transportation. Subsequently, the FRA on October 28, 1992 concluded that the Ninth Circuit's interpretation of the HSA was reasonable, and on January 1, 1993 attempted to apply the Ninth Circuit interpretation nationwide. After several petitions to the Federal Railroad Administration (hereinafter "FRA") to reconsider its decision, various railroads appealed to the Seventh Circuit. In fact three petitions for review were filed with the Seventh Circuit on this same issue.

The initial decision by a three judge panel of the Seventh Circuit held that the decision of the FRA to apply the Ninth Circuit's decision nationwide was reasonable and affirmed the FRA's determination. On Petition for Rehearing and Suggestion of Rehearing *En Banc,* the Seventh Circuit's *en banc* panel granted the railroads' petitions and vacated the FRA's orders.

On March 1, 1995 the FRA sent a letter to the Vice President-Law and General Counsel of the Association of American Railroads informing him that FRA would apply the Seventh Circuit decision in every locale but in those states comprising the Ninth Circuit. (App. 29a-33a). Rather than embarking on an almost interminable number

of appeals in the other circuits, we believe the most reasonable course of action to resolve the controversy is this petition for a Writ of Certiorari.

The HSA limits the hours of work of railroad employees engaged in duties related to train operations and mandates certain off-duty periods. 45 U.S.C. §§ 21101-21107. It limits to twelve hours the number of consecutive hours an employee can remain "on duty." 49 U.S.C. § 21103(a)(1). The HSA also requires that a crew member be allowed ten hours "off-duty" before going back "on-duty" when that employee has worked the twelve hour statutory maximum. 49 U.S.C. § 21103(a)(2). Furthermore, it requires that before an employee may be placed back on-duty, he/she must have received at least 8 hours off-duty during the preceding twenty-four hours. *Id.*

The issue to be resolved in this litigation arises in the common situation when railroad crew members, after working a 12 hour tour of duty, are instructed to stop their train and remain at the site until a new crew relieves them. During that period of time, commonly known as "waiting time," crew members typically are still responsible to their employers for the safety of their train. There exist numerous fact patterns, but normally the crew is not free to leave the train, and continues to be subject to further orders from the railroad. While awaiting arrival of another crew, the employees are required to protect the train against vandalism, assure that the brakes remain properly applied to prevent undesired movement, observe passing trains for defects, and to promptly inform the railroad of any problems noticed. If the crew left the train without permission, it could be disciplined and possibly fired. If the train was vandalized and the crew did not attempt to protect it, the employees would be subject to discipline. If the brakes released and caused an undesired movement, the crew could be disciplined, particularly if an accident occurred as a result. If the crew observed an

obvious defect on a passing train, and did not inform the railroad promptly, the crew might be disciplined.

Both the railroads and the FRA have mischaracterized the issue of "waiting time" as a situation where crew members are "relieved from any further operating responsibilities." The complaints of employees show that crews are frequently compelled to wait for relief crews several hours after expiration of the 12 hour on-duty limit, and sometimes even up to 10 hours longer. One of the safety hazards involved in not counting the above period as on-duty time is that employees are constantly faced with irregular work hours as well as irregular sleep patterns. Extension of the crew members' work day through protracted periods of time spent waiting for deadhead transportation contributes to employee fatigue. This has been shown to be a significant factor in the safety of rail operations. (See *Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 (February, 1991)).

In order to rectify this problem, all that a railroad needs to do is to plan in advance to have a crew ready to relieve the crew on the train, and to have transportation waiting to take the crew to the point of final release. A railroad in most cases has advance notice by following the train movements, and thereby knows whether the crew on the train will reach the 12 hour limit. Also, the crew could inform the dispatcher in advance when and where the 12 hours is likely to expire. In most instances, where waiting time conflicts with the twelve hour rule, these are situations that can be anticipated and properly handled under the HSA.

A review of the statutory language of the HSA, the consistent interpretation of that language by the courts throughout its 88-year history, the legislative history to the 1969 amendments to the HSA, and a consideration of its

remedial purpose, support the conclusion that compulsory time spent waiting by railroad employees for deadhead transportation to their point of final release is time on-duty under the HSA.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE INTERPRETATION OF THE HOURS OF SERVICE ACT.

As previously indicated the Seventh and Ninth Circuits have reached opposite decisions as to whether compulsory time spent waiting by a train crew for deadhead transportation to its point of final release is "on-duty time" under the HSA.

A. The Ninth Circuit Has Concluded That Compulsory Time Waiting for Deadhead Transportation Is To Be Considered as Time on Duty Under the Hours of Service Act.

The Ninth Circuit in a well reasoned opinion held:

> In conclusion, we note once again that waiting time has been considered time on duty throughout the eighty-five year history of the HSA. The FRA's position that this understanding was changed by the 1969 proviso regarding deadhead time finds no support in the statutory language, in the legislative history of the 1969 amendments, or in the policies underlying the statute, and is contrary to reason. Accordingly, we reject it.

975 F.2d at 1428.

B. The Seventh Circuit *En Banc* Has Concluded That the Time Waiting for Deadhead Transportation Is Not To Be Counted as Time on Duty Under the Hours of Service Act.

On the other hand the Seventh Circuit held:

> Further, we hold that, according to the Act, time spent waiting for transportation to a designated

> terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is not time on duty, but limbo time.

Slip Op. 13, App. 14a.

At this point in time we will not burden the Court with an analysis why we believe the Seventh Circuit missed the point as to what the HSA literally states and what was intended by Congress. Suffice it to say that an analysis of the HSA's remedial purpose, its legislative history, and various courts' consistent interpretations since 1907 (including the 1969 amendments), lead to only one valid conclusion—compulsory time spent waiting by railroad employees for deadhead transportation to their point of final release is time on duty under the HSA.

II. THERE EXITS A SERIOUS SAFETY ISSUE WHICH IS DIRECTLY IMPACTED BY THE DECISION OF THE SEVENTH CIRCUIT.

There can be no justifiable disagreement that there exists a direct relationship between fatigue and accidents. *See e.g.* H.R. Rep. No. 91-469, 91st Cong., 1st Sess. 6 (1969). Stress in the workplace, resulting from long and irregular work hours, has long been a source of concern for railway workers, and has recently come to the attention of society at large.

Accidents caused by human error have consistently been a significant portion of the total number of railroad accidents occurring in any given year. Approximately 80% of the railroad accidents investigated by the NTSB over the past 10 years are the result of human error. In the past five years railroad accidents caused by human error consistently have accounted for approximately one-third of all train accidents. Preliminary statistics for 1994 show that 34% of the accidents were caused by human error.

According to Dr. Charles Czeisler, then Director of Circadian and Sleep Disorders Medicine at Brigham and Women's Hospital in Boston, (New York Times, May 15, 1990 at pg. C8) "because their reaction time is affected . . . . sleep deprived people may be more prone to making mistakes on the job." Indeed, sleep researchers indicate that sleepiness is second only to drunkenness as a cause of automobile accidents. The Department of Transportation, in a report to Congress, stated that at least 40,000 traffic accidents a year may be sleep related, and that more than 20% of all drivers have fallen asleep at the wheel.

In 1984, Michael K. Coplen, a locomotive engineer in Gillette, Wyoming published an article concerning the effect of sleep habits on shift workers in the Rocky Mountain News, May 21, 1984 at 39. Coplen referred to several industrial accidents (two train accidents and the Three-Mile Island incident) noting that in each case the accidents occurred between the hours of 3 a.m. and 5 a.m. which, according to several researchers, is the lowest point in our daily cycle of alertness. In addition, Coplen cited an analysis of a fatal crash of a United Airlines plane near Salt Lake City in 1977, where the author concluded that "fatigue caused by frequently changing shift work schedules . . . fostered a series of errors that compounded into a fatal crash."

In the testimony of Dr. Donald I. Tepas, who testified as an expert at the May 12, 1988 hearing by the National Transportation Safety Board regarding the fatal head-on collision of two Conrail trains at Thompsontown, Pennsylvania on January 14, 1988, regularity of work shifts is indeed of great concern in the railroad industry. At the time, Dr. Tepas was a Professor of Psychology and Director of the graduate program in Industrial and Organizational Psychology at the University of Connecticut. Dr. Tepas also served as the U.S. representative on the Scientific Committee on Night and Shift Work of the

International Commission on Occupational Health. According to Dr. Tepas, work systems which result in night work, shifts of unusual length, and unpredictable work hours, such as are presently employed by the railway industry, place workers and the general public at risk by creating a situation in which the workers ultimately become victims of chronic sleep deprivation. NTSB Hearings on *Head-End Collision of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988,* at 1622.

Dr. Tepas' studies on the effect of sleep deprivation and unpredictable and irregular work/rest cycles were summarized in the *National Transportation Safety Board Railroad Accident Report, Head-End Collission of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988, NTSB/RAR-89/02, (1989)* (Hereinafter *NTSB Report*). According to Dr. Tepas, workers do not remedy this hazardous condition by making up for lost sleep on their days off, nor do they "adapt" to the irregular work hours. Dr. Tepas testified that chronic sleep deprivation results in fatigue, frequent microsleeps or lapses (periods in which workers fall asleep for a short time then awaken spontaneously, unaware that they had been sleeping at all). *NTSB Report,* at 37. Dr. Tepas notes that the frequency and duration of such lapses increase as the person becomes more chronically sleep-deprived. *Id.* Although the worker will perform his task perfectly both before and after the lapse, he is asleep during it. As a result, the worker will not respond at all to external stimuli unless they are massively sensory in nature, very unusual, or particularly meaningful. *Id.*

Also, Dr. Tepas stated that workers subject to non-systemic and unpredictable changes in their work schedules are highly susceptible to variation in alertness and consciousness that are associated with their circadian "body-clock," which is typically at its lowest ebb between

roughly 1 a.m. and 7 a.m. He said that workers suffering from the effects of chronic sleep deprivation are more susceptible to environmental conditions which promote sleep. Extensive studies have been conducted on operating crews in which, not only single crew members, but on some occasions, entire crews have fallen asleep while performing their jobs. *Id.*

Based upon the NTSB's analysis of the Thompsontown accident and other prior accidents it concluded:

> 17. The changing nature of railroad operations and competitive factors have materially increased the relative number of train crew members who must work irregular and unpredictable shifts on a long-term basis.
>
> 18. Since train crew members lack the requisite training to recognize the condition, they may allow themselves to become chronically sleep-deprived and develop physiological problems that impact adversely on their performance. Conrail and the other railroads need to recognize and deal with this probability by modifying their operations to reduce shift irregularity and by instituting educational and intensified medical examination programs.

(*NTSB Report* at 53).

Unpredictable work/rest cycles of the crew was cited by the NTSB as one of the causes of the Thompsontown accident.

(*NTSB Report* at 54).

As pointed out by the former Chairman of the NTSB, James L. Kolstad, in testimony on February 19, 1991 before the *House Subcommittee on Transportation and Related Agencies, Committee on Appropriations, concerning both the August 9 and November 7, 1990, railroad accidents at Sugar Valley, Georgia and Corona, California,* work/rest cycles of railroad crew members is a con-

cern. He said that crew member fatigue has been placed on the NTSB's "Most Wanted" list of safety issues.

(Testimony at p. 22).

Again, on June 12, 1991, Mr. Kolstad testified on the *Railroad Safety Reauthorization before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce,* where he stated:

> Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.
>
> Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules—a situation that has not changed since the beginning of railroading. The changing nature of railroad operations and competitive factors have increased the relative numbers of crewmembers and others in safety sensitive positions who must work irregular and unpredictable shifts—often on a long term basis.

Hearings, p. 167.

He also said that "We have found in accident after accident that workload and work/rest issues have been critical factors." *Id.*

The NTSB's Report of the Corona, California accident on November 7, 1990, also demonstrates the hazards in railroad operations resulting from irregularity and unpredictability of a train crew's work schedule. The Board concluded that both of the locomotive crew members had fallen asleep because of acute fatigue, partly resulting from the irregularity and unpredictability of the work schedule. *(National Transportation Safety Board Railroad Accident Report, Atchison, Topeka and Santa Fe Railway Company (ATSF) Freight Trains 818 and ATSF*

on 891 on the ATSF Railway Corona, California (November 9, 1990) RAR-91/103 at p. 45 (July 23, 1991).

Further support of the adverse safety effects of irregular work cycle is contained in *Biological Rhythms, Sleep, and Performace,* by Wilse B. Webb at pp. 59-87, 110-141, 175-204 (John Wiley & Sons 1982); and testimony of Dr. Charles Czeisler at the *Hearings* on *Shift Work Scheduling and Biological Clocks Before the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology,* 98th Cong., 1st Sess. 176 (1983).

The FRA itself has undertaken two studies of the issues related to irregular work hours, excessive work hours, and waiting time, on February 1991 and June 1992. See *Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 and DOT-VNTSC-FRA-91-1 (February, 1991), and *Engineman Stress and Fatigue: Pilot Tests,* U.S. Department of Transportation, Federal Railroad Administration, DOT/FRA/ORD-92-17 (June, 1992). In the earlier study the findings were that: (1) Two of the three focus groups involved in the study cited unpredictable working hours as the most important single cause of stress and fatigue; (2) Many participants noted sleep was often taken at times and in amounts which were inappropriate to the hours on-duty which followed, otherwise the employee would hardly ever be able to participate in family activities; (3) In the first focus group the railroad's train scheduling system is sufficiently advanced to provide 8 hours advance notice of jobs about 90% of the time; (4) Eight hours off duty seldom translates into more than four hours sleep because of the time required to get to a motel and eat coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts.

In the second FRA study, some of the findings showed that: (1) during the course of the experiment subjects tended to doze off, presenting the possibility of serious performance errors; and that (2) the sleep records of engineers were irregular and atypical when compared with non-engineers.

Finally, even the FRA, in its latest position on this overall issue, pointed out the safety hazards associated with irregular work hours and lack of rest. (See App. 29a):

> FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive perfomance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release.

Based upon the serious consequences to safe railroad operations that arise from the opinion of the Seventh Circuit in acting contrary to case law, the law's historical application, its legislative history, and its remedial purpose, this case warrants review by the Court.

CONCLUSION

In conclusion, we respectfully request that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., ILLINOIS CENTRAL RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

FEDERICO PEÑA, Secretary of Transportation, *et al.*,
Respondents,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and
UNITED TRANSPORTATION UNION,
Intervening Respondents.

On Petitions for Review of Orders of the
Federal Railroad Administration

ARGUED FEBRUARY 22, 1994—DECIDED JULY 13, 1994
ARGUED EN BANC OCTOBER 18, 1994—
DECIDED DECEMBER 29, 1994

Before POSNER, *Chief Judge*, BAUER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.**

BAUER, *Circuit Judge*. Petitioners, nine of the nation's largest railroads accounting for ninety percent of the industry's train operations, petition for review of the Federal Railroad Administration's (FRA) re-interpretation of the Hours of Service Act of 1907, 45 U.S.C. §§ 61-66. The railroads challenge the FRA's recent announcement that it was abandoning an established interpretation of the Act and would consider as time on duty that time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned. We find that the FRA's decision is entitled to no deference, and we interpret the Act, and eighty-five years of industry practice, such that this waiting time does not constitute time on duty.

Some background is necessary to place this issue in proper context. The Hours of Service Act imposes a limit on the maximum hours of service that a train crew can continuously operate trains while on duty. From the date of its original enactment through the late 1960's the Interstate Commerce Commission administered and enforced the Act. Then, the Federal Railroad Administration, a component of the Department of Transportation, was created to take over those duties from the ICC.

"The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R. Co. v. United States*, 247 U.S. 197, 199 (1918). In its original form, the Act limited train crews to sixteen continuous hours operating trains. c. 2939, § 2, 34 Stat. 1416 (codified as amended 45 U.S.C. § 62(a)(1)). Congress amended the Act so that

* The Honorable Walter J. Cummings did not participate in the argument or decision in this case.

since 1971, the maximum shift consists of twelve hours. 45 U.S.C. § 62(a)(1). The Act also imposes mandatory time off duty before an employee can resume his operating duties. An employee who has worked a continuous twelve-hour shift must receive ten consecutive hours off duty. *Id.* In addition, no employee can be called to operations duty unless he has received eight continuous hours of off-duty time in the preceding twenty-four interval. 45 U.S.C. § 62(a)(2).

Because of the itinerant nature of railroad operations, the limitation on a train crew's hours of service presents special problems on railroads. Obviously, when a train crew reaches its twelve-hour maximum it must cease operating its assigned train. If the train has not yet reached its destination, the "expired" or "outlawed" crew must "park" the train and wait for transportation to its designated terminal. The transportation typically is in the form of a railroad-owned van or another train going to the crew's designated terminal. The desigated terminal may be the crew's home terminal or the "away from home" terminal designated by the railroad. *See* 45 U.S.C. § 61(b)(4). The railroad must then transport another crew to the parked train to operate the train until it reaches its destination. Transportation to or from a parked train is called "deadhead" transportation.

In its 1969 amendments to the Act, Congress addressed the categorization of the time spent by crews in deadhead transportation. Section 61(b)(3)(C) includes as time on duty that "[t]ime spent in deadhead transportation by an employee to a duty assignment: *Provided*, [t]hat time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty . . . ." The time spent in deadhead transportation from the parked train to the crew's designated terminal became known as "limbo time:" time which does not count against the twelve-hour limitation upon on-duty time nor contributes to the off-duty time that

necessarily must accrue before an employee may return to duty. Unfortunately, the Act does not specifically address how time spent by an outlawed crew waiting for deadhead transportation must be categorized. Since the enactment of the 1969 amendments to the Act, the FRA has treated this waiting time as though it was time spent in deadhead transportation to the crew's designated terminal; the waiting time, thus, has been treated as limbo time. In addition, it appears that the Act, at least in the practical terms of the way it had been enforced since 1907, had never been construed to require that this waiting time be considered time on duty.

Things changed in 1992. In that year, the Ninth Circuit Court of Appeals rejected the FRA's interpretation of the Act in *United Trans. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Oddly, the Ninth Circuit held that the time spent waiting for deadhead transportation to a crew's designated terminal is time on duty, "based on the language of the HSA and on its consistent interpretation by the courts throughout its 85-year history." *Id.* at 1422. In an unusual move in that case, while it vigorously defended its own interpretation of the Act, the FRA declared itself willing to adopt and enforce the Ninth Circuit's interpretation of the Act, whatever its decision.

As a result of the Ninth Circuit's decision, the FRA notified, by way of a letter dated October 28, 1992, from its Chief Counsel, the Association of American Railroads that while the FRA has traditionally regarded the waiting time as limbo time, it no longer would. The letter stated that the FRA did not agree with the Ninth Circuit's rationale, but would adopt it and enforce it nationwide. The FRA implemented its new enforcement scheme on November 1, 1992, in those states that comprise the Ninth Circuit, and on January 1, 1993, in the rest of the country. Within sixty days of the nationwide effective date, the railroads filed in this court a petition for review

pursuant to 45 U.S.C. § 431(f) and 28 U.S.C. § 2342(7). In addition, the railroads filed with the FRA a Petition for Interpretation of the Hours of Service Act on March 26, 1931.[1] On April 8, 1993, the FRA published its new interpretation of the Act in the Federal Register, much of which was taken verbatim from the FRA's letter to the railroads. From this agency action, the railroads filed another petition for review on June 7, 1993. Finally, in response to the FRA's July 1, 1993, denial of the railroad's Petition for Interpretation, the railroads filed yet another petition for review from this agency action. All told, the railroads filed three petitions for review.

This description of this flurry of activity between the FRA and the railroads leads us to inquire whether we have jurisdiction to settle this dispute. Section 2342(7) of Title 28 confers exclusive jurisdiction upon the appropriate court of appeals to enjoin, set aside, suspend, or to determine the validity of all final agency actions with respect to federal railway safety laws. All that is required to invoke this jurisdiction is the filing of a petition in accordance with 28 U.S.C. § 2344, which the railroads have done. Because the FRA's action is clearly within the ambit of the federal railway safety laws, the only possible issue with respect to our jurisdiction is whether the FRA's conduct constitutes a final agency action within the meaning of the statute.

Congress amended § 2342 in 1992 to include subsection 7. Because of the recent vintage of this amendment, there is a lack of authority as to what constitutes a "final agency action" pursuant to 28 U.S.C. § 2343(7). Because it appears that "final agency action" in this context carries the same meaning as it does in the Administrative

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[1] The railroads apparently modeled their Petition after the type described in 5 U.S.C. § 553(e). As we shall soon see, agencies such as the FRA, who promulgate only "interpretive rules," are not subject to such Petitions.

Procedures Act, § 10(c), 5 U.S.C. § 704, we will apply the same standards applicable to the APA.

Several factors are significant in determining the finality of agency action, including: 1) whether the challenged action is a definitive statement of the agency's position; 2) whether the actions have the status of laws with penalties for noncompliance; 3) whether the impact on the aggrieved party is direct and immediate; and 4) whether immediate compliance was expected. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 150-52 (1967). After reciting these factors, the Supreme Court recently stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the resut of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 112 S. Ct. 2767, 2773 (1992).

In this case, there is no question that the FRA made absolutely clear that it would enforce the Act in accordance with its new interpretation, thereby compelling the railroads to alter their operations to comply with the FRA's directive or face stiff penalties for noncompliance. To answer the "core question," the agency completed its decisionmaking process (or at least the Ninth Circuit completed the FRA's decisionmaking for it) and the result directly affected the railroads. The FRA's communication of its change in interpretation of the Hours of Service Act constitutes a final agency action within the context of 28 U.S.C. § 2342(7), and therefore, we have jurisdiction to hear this case and we grant the railroads' petitions for review.[2]

[2] It is not necessary that we parse out which of the three agency communications of its decision to change its interpretation of the Act constitutes a "final agency action." The railroads timely filed petitions in response to all three agency missives, each of which presents the sole issue in this case. Obviously, the FRA's publication of its decision in the Federal Register was the communication of the most official character, but this publication, as well as the first letter to the railroads and the letter rejecting the railroads' Petition for Interpretation, demonstrate that the agency had completed its decisionmaking. Thus, the jurisdictional dictates are clearly satisfied.

The first issue here is what deference, if any, we are to allow the FRA's new interpretation of the Act. The FRA argues that its interpretation of the Act is entitled to substantial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under *Chevron,* the interpretation of an ambiguous statute by an agency that is authorized by Congress to promulgate rules under the statute is to be upheld if it is a reasonable one. While the Hours of Service Act is not unambiguous, the FRA's interpretation is not entitled to the generous treatment afforded agency interpretations under *Chevron.*

Both the railroads and the FRA agree on an important point: that the FRA has not been granted rule-making authority by Congress. The Supreme Court made clear in *Chevron,* 467 U.S. at 843-44, that only statutory interpretations by agencies with rule-making powers deserve substantial deference. The principal rationale underlying this deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details. But Congress typically does not permit the agency to run free in this endeavor; the Administrative Procedures Act establishes certain procedures that the agency must follow. Chief among them is the notice-and-comment provision of the APA. 5 U.S.C. § 553. This rulemaking process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny. It is this process that entitles the administrative rules to judicial deference.

In instances in which the agency does not have rulemaking authority, however, we consider the agency's application of statutory provisions "interpretive rules." 5

U.S.C. § 553(d)(2); *see Doe v. Reivitz,* 830 F.2d 1441, 1447 (7th Cir. 1987). These interpretive rules are treated differently by the APA. They are exempt from the notice-and-comment requirements of rule-making. 5 U.S.C. § 553(d)(2). In addition, interested parties do not have the right to petition the agency for review of its interpretive rulings as they do with respect to agency rules. *See* 5 U.S.C. § 553(e).

The difference between the two types of agency action is manifest in this case. The FRA arbitrarily decided to abandon twenty-three years (at least) of statutory interpretation and adopted the Ninth Circuit's interpretation, even though it acknowledged that that court's rationale was flawed. The FRA's adoption of that position was not subject to the sort of process that ensures the legitimacy of the legislative or administrative rule-making process. Moreover, the railroads were not permitted to petition the FRA for review of its new interpretations; when they did, the FRA (properly) informed them that it was not required to respond. As a result, considering that the FRA made it clear that it was going to enforce this new interpretation, the railroad's only course of action was to seek judicial review under Title 28.

This is not to say that interpretive rules, while undeserving of substantial deference under *Chevron,* do not warrant any deference from a reviewing court. It simply means that we do not "rubber stamp" these interpretive rules. *Pennington v. Didrickson,* 22 F.3d 1376, 1383 (7th Cir. 1994). Whatever degree of deference due these interpretive rules is dictated by the circumstances surrounding the agency's adoption of its statutory interpretation. "The weight given to an agency interpretation depends on many factors, including the validity of its reasoning, its consistency with earlier and later agency pronouncements and whether the administrative document was issued contemporaneously with the passage of the statute being interpreted." *Doe v. Reivitz,* 830 F.2d

at 1447. In short, we look to "the thoroughness, validity, and consistency of the agency's reasoning." *Orrego v. 833 West Buena Joint Venture,* 943 F.2d 730, 736 (7th Cir. 1991) (citing *United States v. Markgraf,* 736 F.2d 1179, 1184 (7th Cir. 1984)).

The FRA's current interpretation of the Act reflects none of the benchmarks indicative of a "deliberate attempt of the agency to implement the will of Congress through the regulatory process." *Pennington,* 22 F.3d at 1383. By its own admissions, the characteristics of the FRA's current interpretation are completely opposite to those for which we seek. The current interpretation is inconsistent with twenty-three years of agency enforcement; notwithstanding its present plaintive cries that it has always considered this a close question, the FRA has always enforced the Act in a manner opposite that of its current position. In addition, this is an interpretation not contemporaneously made with the legislation or its relevant amendments, but twenty-three years later.

Finally, the FRA's current interpretation is not a thorough and reasoned interpretation. It was adopted for no other reason than because the Ninth Circuit disagreed with its prior interpretation. In its letter to the railroads and in its notice in the Federal Register, the FRA candidly admitted that it did not agree with the Ninth Circuit's reasoning. It cannot now rely on *post hoc* rationalizations regarding safety to justify its abrupt decision to alter its interpretation. This interpretation by the FRA, lacking the characteristics for which we look to determine the reasonableness of agency action, deserves no deference from this court.

A final point with respect to deference: Any deference that we might confer upon an agency interpretation of a statute must be to the agency's diligent study of the statute and the underlying activity it seeks to regulate. Here, however, the FRA is essentially asking that we defer to the Ninth Circuit's interpretation of the Act.

It was the Ninth Circuit to which the FRA delegated its authority to interpret the Act when it declared that it was willing to accept whatever determination the Ninth Circuit made. And while we carefully consider the opinions of our sister circuits, we certainly do not defer to them. *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits.[3] The FRA's abdication of its authority in this matter serves to deny the FRA the substantial deference it seeks.

Having dispensed with the issue of deference, we move on then to decide whether time spent waiting for deadhead transportation is time spent on duty. Despite the vigor with which this issue has been litigated both here and in the Ninth Circuit, we believe the statute itself resolves this issue quite clearly. Mindful that the purpose of the Act and its amendments is safety in operating trains, we hold that time spent waiting for deadhead transportation is not time on duty, but limbo time.

The statute does not address this issue in so many words, but it clearly dictates our holding. Section 61 (b)(2) states that the Act applies only to employees "actually engaged in or connected with the movement of any train . . . ." In addition, according to section 61 (b)(3) of the statute, time on duty commences when a crew reports for duty and terminates when the crew is finally released from duty. Further, section 61(b)(3) (D) specifically states that time on duty is comprised of "time an employee is actually engaged in or connected with the movement of any train." The statute's treatment

[3] *United States v. Coleman*, 38 F.3d 856 (7th Cir. 1994) (in conflict with *United States v. Carillo*, 991 F.2d 590 (9th Cir. 1993)), and *United States v. Michelle's Lounge*, No. 92-3235, slip opinion (7th Cir. October 27, 1994) (in conflict with *United States v. Consiglio*, 866 F.2d 310 (9th Cir. 1989)), are but two recent examples of disagreements with the Ninth Circuit.

of on-duty time makes sense and comports with the purpose of the statute; the hazards of train operation occur when the train is moving.

During the time an outlawed crew waits for its deadhead transportation, however, it has no further operational duties.[4] Obviously, this time spent waiting by the outlawed crew is not time the crew operates a moving train. Unfortunately, the resolution of this issue is not so simple. Remember, time spent in deadhead transportation to the parked train is considered on-duty time. Our evaluation of the time spent waiting for deadhead transportation from the train, then, is directed by the statute's emphasis on the operation of a moving train and the statutory scheme regarding this type of non-operational time.

After a crew completes its shift, each employee is required to receive a specified time during which he is able to rest before he is able to operate a train again. Thus, any time spent by an employee that denies him adequate opportunity for rest or that detracts from the rest that he has received must be treated in a way that enhances safety in operating a moving train. Simply put, in characterizing time spent by an employee not directly connected to the operation of a moving train, the critical consideration is how that time will affect the employee who must operate a moving train. Two specific aspects of the 1969 amendments to the Act highlight these principles.

As mentioned previously, section 61(b)(3)(C) states that time spent in deadhead transportation by an employee *to* a duty assignment is time on duty. This is time

[4] We do not address in this case the situation in which an outlawed crew is called upon to perform additional, non-operational, duties during and after its twelve-hour shift. The statute accounts for that circumstance; in instances in which additional duties are commingled with those of operating a train, the entire time spent by the crew is considered time on duty. 45 U.S.C. § 62(b).

the employee cannot spend resting and which may ultimately impact his performance during the latter hours of his shift. This section also states that time spent in deadhead transportation *from* the train to the point of final release is not off-duty time. Nor is it time on duty; hence the tag limbo time. This time is treated in this way for two reasons. First and foremost, it is not on-duty time because the employee has no more operational responsibilities and this time, therefore, does not implicate railroad safety. Second, it is not off-duty time because the employee receives no legitimate opportunity to rest.

This analysis of section 61(b)(3)(C) compels our finding that time spent waiting for deadhead transportation is limbo time. In this scenario, the crew has been relieved of all operating duties. It may await transportation on the train or leave the train to await transportation elsewhere. The crew just might retire to a nearby saloon to pass the time. Wherever the outlawed crew waits, it is precluded from operating the train, technically by the statute and practically by the railroad, until the crew receives the requiste off-duty time. The crew's time spent waiting has absolutely no impact on its ability to operate trains. In this way, the waiting is analogous to time spent in deadhead transportation from a duty assignment and is not analogous to time spent in deadhead transportation to a duty assignment. Further, the strong analogy between the waiting time and the time actually spent in deadhead transportation dictates that the waiting time be treated as limbo time.

Having determined that the statute resolves the issue, the dispute as to how this time was treated prior to the amendments is unimportant. We digress, however, to briefly explain our understanding of its pre-1969 treatment because the Ninth Circuit framed its decision in that way. The Ninth Circuit set forth the issue as to whether Congress had intended to change the characterization of waiting time as the Act had been applied before the amendments. *Skinner*, 975 F.2d at 1426. It determined that waiting time had been considered on-duty time and based its holding on a slew of cases from the early part of this century. *Id.* We however, read those cases as addressing the categorization of time spent by a railroad crew waiting for repairs to be made or for some other delay before resuming its duties of operating the train; these cases held that the crews were on duty during the time they spent waiting. The holdings in those cases are consistent with our reasoning here: that time spent waiting must be evaluated for its impact on the crew's ability to operate its train.

In addition, there was a substantial amount of testimony at Congressional hearings, offered by both union and railroad representatives, that this waiting time was never treated as on-duty time. So, it appears that time spent waiting for deadhead transportation from a train was treated the same before the amendments as immediately after. Our determination simply underscores the point that the FRA's change in interpretation of the statute reversed a long-held practice of deploying crews and imposed a significant hardship on the railroads without contributing to railroad safety.

The FRA contends that there are safety issues associated with categorizing waiting time as limbo time. If that is so, the appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act. But the FRA may not effectively amend the statute by way of an interpretive rule to comport with its views on how this waiting time impacts safety issues, whether they be real, illusory, or just plain convenient.

Finally, the FRA contends that by invalidating its interpretation, we will create an enforcement nightmare resulting from this split between circuits. That may be true, but there is nothing we can do about it. We can only remind the FRA that it is entrusted with the en-

forcement of the Hours of Service Act and any decision it makes to refrain from prosecuting violations of the Act is left to its absolute discretion. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (collecting cases).

In conclusion, we find that the FRA's communications of its interpretation of the Hours of Service Act constitute a final agency action pursuant to 28 U.S.C. § 2342(7), but conclude that it is not entitled to any deference from this court. Further, we hold that, according to the Act, time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is not time on duty, but limbo time. Accordingly, we GRANT the railroads' Petitions for Review and VACATE the FRA's orders.

EASTERBROOK, *Circuit Judge*, with whom POSNER, *Chief Judge*, and MANION, *Circuit Judge*, join, concurring. When judges speak of "deference" to an administrative decision or interpretation, they may mean any of three situations:

- Delegation. When Congress has given an agency the power to adopt legal norms via formal rulemaking or administrative adjudication, the court must accept action within the scope of the delegated power the same way it accepts legislation.
- Respect. When the statute tells the executive branch to achieve a goal, the choices made in pursuit of that objective are political in nature. The President rather than a judge decides how to execute the laws, and a court therefore must respect the discretionary choices a coordinate branch of government has made in the course of implementation.
- Persuasion. On a "pure" question of law, an agency's views may persuade when they cannot compel. To the extent statutory text and structure are conclusive on the issue of meaning, an agency may persuade by illuminating how the pieces of the statute fit together. To the extent other factors (collectively "legislative intent") matter, the agency may have better access to indicators of this intent than do judges.

Using one word for three distinct subjects breeds confusion. Justice Breyer believes that it has done worse—that it sometimes has led courts to give more force to an agency's legal arguments (the "persuasion" category) than to the agency's choices about wise policy (the "respect" category), reversing the proper role of the political and judicial branches. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

Today's case shows how vocabulary affects analysis. The Federal Railway Administration has not been delegated either rulemaking or adjudicative power over the subject of hours of service. It therefore cannot demand obedience to its law-making choices after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). But it does oversee implementation of the wages and hours laws (and much else of concern to railroads and their workers), and therefore not only may have persuasive thoughts about the interpretation of the laws but also may be entitled to make some choices about implementation.

When an agency seeks to persuade us that its legal analysis is correct, we pay attention to whether it has longstanding, consistent views, see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), for a legal interpretation adopted soon after the statute's enactment may be the best evidence of the meaning the words carried in the legal profession at the time. Alterations in the legal and cultural landscape may make the meaning hard to recover; a contemporaneous understanding captures much of value, while changes of position may reflect only a shift in views of sound policy and therefore do not assist in ascertaining the original meaning. See *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-02 & n.7 (1991). When, however, an agency offers a view about wise administration, a change in perspective may show that the agency is sensitive to the contemporary economic context—the railroad industry, for example, has undergone a revolution in the last 30 years—and therefore is doing its job. Applying the word "deference" to both respect and persuasion implies that consistency of administrative views always cuts in favor of the agency's position. Yet consistency ought to matter only when the agency is seeking to persuade—and even then only when the consistent interpretation offers us a view into the understanding of the original interpretative community. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring); *Mayburg v. Secretary of HHS*, 740 F.2d 100, 105-07 (1st Cir. 1984) (Breyer, J.). See also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351 (1994); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2101-04 (1990).

Taking "deference" as a unitary concept, my colleagues observe that the FRA has changed positions, and they conclude that its position is therefore not entitled to deference. I look at this differently. If the question is the way 45 U.S.C. § 61(b) treats deadhead transportation at the end of duty, then consistency is informative—and the FRA has been consistent. Ever since 1907, when the Hours of Service Act came into being, the FRA and its predecessors have believed that time between the end of work and arrival at a place of rest does not count as time on duty. The agency adhered to this position immediately after the 1969 amendments and has not wavered. The published statement that we review, 58 Fed. Reg. 18163-66 (Apr. 8, 1993), reiterates this position, stating that the FRA disagrees with the legal analysis of *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). To the extent the question at hand is "Does 45 U.S.C. § 62(b) treat time after the crew is relieved of work on the train as time 'on duty'?", the FRA has been consistent; and to the extent stability lends persuasive force to its position, we should be falling into line.

After reaching a judgment about the interpretation of the Hours of Service Act, the FRA reached a second judgment—about the desirability of uniform application. It told the ninth circuit, announced in the Federal Register, and now has told us, that a single national rule is superior given the integrated nature of the national railroad system. Once again the agency has been consistent. Its views about the benefits of uniformity induced it to

put the ninth circuit's interpretation into force nationwide, despite its belief that the ninth circuit got the law wrong. If the combination of the two can be called a flip-flop (on the ground that the FRA now is administering the Act differently), the change is attributable to the malleable legal landscape. Agencies ought to respond to legal and economic changes rather than to plow on as if nothing had happened. In making a judgment that a uniform rule is preferable to subjecting the railroads (and perhaps particular crews) to multiple legal schemes, the agency has adopted a position on sound administration. We must decide whether this is the type of decision that deserves our respect.

To change the terminology, the FRA decided to acquiesce in the ninth circuit's interpretation. It thought that litigation should come to an end without the complicated dance that generates a conflict among the circuits and so propels the subject onto the Supreme Court's agenda. The FRA believes that on this subject it is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Courts regularly denounce agencies for *not* following judicial interpretations, so it is a little surprising to see the FRA boxed about the ears for complaisance. Agencies stick to their guns when they believe the difference in legal positions or practical consequences important; but if they think that the arguments are closely balanced or the practical consequences of the two positions similar, they may conclude that one case is enough—especially if they think that the Solicitor General would not deem the subject sufficiently important to justify a petition for certiorari. If the Solicitor General declines to seek, or the Supreme Court declines to grant, further review, then nonacquiescence may yield entrenched differences among the circuits. We know from *United States v. Mendoza*, 464 U.S. 154 (1984), that the executive branch need not

follow a circuit's interpretation, even within that circuit's borders. See also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989); cf. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43 (1993). But an agency prudently may decide to acquiesce, to reduce uncertainty and the costs of both the legal process and compliance with multiple standards, a particular problem for firms with peripatetic operations.

When an agency declines to acquiesce, a court does not "defer" to this decision. A person aggrieved by the agency's decision to fight like a tiger is entitled to judicial review. The court construes the statute after an independent inquiry, and the agency prevails only if it has the stronger argument on the merits. Just so with acquiescence. A party aggrieved by the agency's decision to throw in the towel may protest and obtain an independent decision. Acquiescence and nonacquiescence are mirror images when each produces winners and losers in the private sector. If courts review nonacquiescence decisions without a thumb on the scale in favor of the agency's choice, they must review acquiescence decisions independently. *Mendoza* itself supplies a strong argument: additional litigation may lead to a conflict among the circuits and review by the Supreme Court with the benefit of additional legal views that increase the probability of a correct disposition. Today's decision may well lead the Supreme Court to address the question. An agency may be wise in thinking that national uniformity is highly desirable. When acquiescence affects only the public fisc (when, for example, the IRS accepts a decision that reduces collections), the agency's decision is dispositive; it is an exercise of the President's power to execute the laws. When private rights exist on both sides, the agency's decision one way or the other on acquiescence is contestable in order to hold the balance true among the private interests.

Whenever this court decides whether to create a conflict among the circuits, it makes a decision about the benefits of uniformity versus accuracy no different in principal or effect from the decision the FRA made about the Hours of Service Act. When the Supreme Court decides to let a conflict simmer, or to grant plenary review, it makes a similar decision. Nationwide implementation of the decision of the first circuit to encounter a question is not, therefore, the sort of executive prerogative to which a court owes the respect that it must accord the executive's decision about sound administration of the law. It is a subject on which judges are free to exercise their own judgment, when a party aggrieved by the agency's decision complains. I therefore agree with my colleagues that we need not "defer" to the FRA's acquiescence position. We ought, however, to grant some persuasive force to its consistent view of the meaning of the law. This brings us out in the same place, and, with a few exceptions, for the same reasons. I therefore join not only the court's judgment but also its opinion, except for the discussion of deference at pages 6-10.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., ILLINOIS CENTRAL RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,
Respondents,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and UNITED TRANSPORTATION UNION,
Intervening Respondents.

On Petitions for Review of Orders of the Federal Railroad Administration

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ARGUED FEBRUARY 22, 1994—DECIDED JULY 13, 1994

Before BAUER and MANION, *Circuit Judges*, and GILBERT, *Chief District Judge.**

GILBERT, *Chief District Judge*. The petitioners bring this petition for review of orders of the Federal Railroad Administration (the "FRA") changing its interpretation

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* Judge J. Phil Gilbert, Chief District Judge from the Southern District of Illinois, is sitting by designation.

of the Hours of Service Act, 45 U.S.C. §§ 61-66 (the "HSA" or the "Act"), to provide that time spent waiting by a train crew, which has been relieved from all train operating duties, for transportation back to its point of release is now "on duty" time to be counted toward the maximum 12 consecutive hours on duty allowed by the HSA. For the reasons given below, we grant the petition and affirm the agency's decision.

As a preliminary matter, we must determine whether we have jurisdiction over this matter. Pursuant to 28 U.S.C. § 2342(7) the court of appeals (other than the U.S. Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, among others, all final agency actions described in section 202(f) of the Federal Railroad Safety Act of 1970 [45 U.S.C. § 431(f)]. The Federal Railroad Safety Act provides that "The Secretary of Transportation . . . shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . ." 45 U.S.C. § 431(a). The Secretary of Transportation is charged with administration of the Hours of Service Act. 49 U.S.C. § 1655(e)(2). The Secretary has delegated this function to the FRA, a federal agency within the Department of Transportation. The Federal Railroad Safety Act also provides:

> Any final agency action taken by the Secretary under this subchapter or under any of the other Federal railroad safety laws, . . . is subject to judicial review as provided in chapter 7 of Title 5. Except as provided in section 432(e) of this title, any proceeding to review such final agency action shall be brought in the appropriate court of appeals as provided by and in the manner prescribed in chapter 158 of Title 28.

45 U.S.C. § 431(f). Accordingly, we find that we do have jurisdiction to consider this petition.

I. Background

The HSA regulates the maximum hours of service that a train crew can be continuously on duty. The Act currently allows railroads to operate crews up to a maximum of 12 consecutive hours. The HSA also imposes mandatory rest periods before employees involved in train operation can be recalled to work. An employee who has been continuously on duty for the maximum 12 hours cannot go on duty again until he or she has had at least 10 consecutive hours off duty. In addition, an employee cannot return to duty unless he or she has had at least 8 consecutive hours off duty during the preceding 24 hours.

When a train crew cannot reach its destination within the maximum 12 hour period, the railroad must order the crew to "park" the train and await transportation back to the crew's designated terminal release point. When the crew reaches this maximum 12 hour limit it is said to be an "expired" or "outlawed" crew. The time spent in "deadhead" transportation to its designated release point is "limbo" time, because it is not on-duty time for purposes of the 12 hour maximum, nor is it off-duty for purposes of the mandatory rest periods. This limbo time is specifically excluded from time off duty in the statutory language, just as deadhead transportation *to* the crew's beginning point *is* on duty time. The question is, what about time spent waiting for the deadhead transportation back to the point of release?

The FRA had previously interpreted the 1969 amendment to the HSA, which cut the maximum hours from 16 to 12 and added the language about deadhead transportation, to mean that time spent by an "outlawed" or "expired" crew waiting for deadhead transportation to its designated release terminal was *not considered on-duty time*. The FRA treated this waiting time as part of the transportation and therefore limbo time.

The Ninth Circuit Court of Appeals rejected the FRA's interpretation in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). The Ninth Circuit held that such time spent waiting for deadhead transportation must be counted as *time on duty* for purposes of the 12 hour maximum. The Ninth Circuit said, "based on the language of the HSA and on its consistent interpretation by the courts throughout its 85-year history, we conclude that such waiting time is and always has been time on duty for purposes of the statute." *Id.* at 1422.[1] The FRA then decided to adopt this interpretation of the HSA nationwide, even though the FRA had opposed the interpretation in the Ninth Circuit. It is this decision of the FRA that the petitioners challenge.

II. Analysis

A. Standard

When we review an agency interpretation we must follow the two-step analysis mandated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82 (1984): (1) first, the court must consider whether Congress has spoken directly to the identical question at issue, for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress; (2) if the statute is silent or ambiguous with respect to the specific issue the court must consider whether the agency's interpretation is a reasonable one.

B. Discussion

The HSA defines time "on duty" as follows:

> Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:

[1] There has been only one prior reported decision holding that time waiting for deadhead transportation is on duty time. *United States v. Pennsylvania RR Co.*, 275 F.Supp. 345 (W.D.Pa. 1967).

> (A) Interim periods available for rest at other than a designated terminal;
>
> (B) Interim periods available for less than four hours rest at a designated terminal;
>
> (C) Time spent in deadhead transportation by an employee to a duty assignment: *Provided*, that time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty;
>
> (D) The time an employee is actually engaged in or connected with the movement of any train; and
>
> (E) Such period of time as is otherwise provided by this chapter.

45 U.S.C. § 62(b)(3).

In determining whether the interpretation adopted by the FRA is the proper one, we first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, at 842-43, 104 S.Ct. at 2781-82. On the other hand, "if the statute is silent or ambiguous with respect to the specific issue," the court must consider whether the agency's interpretation is a reasonable one. *Id.* at 843.

The statute is clearly "silent or ambiguous" with respect to the question of whether time waiting for deadhead transportation is on-duty time, limbo time, or off-duty time. So we must consider whether the agency's interpretation is "a reasonable one." In order to make that determination we must consider whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* If the answer is yes, then the Court must defer to the interpretation advanced by the agency

charged with administering the statute. *Id.* We would have to reject any administrative construction which is contrary to clear congressional intent. We are not, however, required to agree completely with the construction put forward by the agency. *Chevron* tells us that we do not have to find the agency's interpretation is the only one it could have adopted, nor does it have to be the interpretation we would have reached if the question initially arose in a judicial proceeding. *Id.* at 843, n.11. Had this question come before us originally we would have been inclined to draw a bright line at a different point in time, that is, at the time the relief crew took over operation of the train and the "expired" crew was therefore relieved of all operating duties. But that interpretation is not the one reached by the Ninth Circuit and not the one adopted by the FRA.

Because we conclude that the language of the HSA does not definitively answer the question regarding the proper characterization of waiting time, we next consider whether the FRA's interpretation "is based on a permissible construction of the statute." *Id.* If so, we are required to defer to the interpretation advanced by the agency charged with administering the statute. *Id.* at 844.

We find that the interpretation advanced by the FRA, in reliance on the Ninth Circuit opinion, is reasonable and based upon a permissible construction of the HSA. Indeed, we would be hard pressed to say that an agency's reliance upon the opinion of a Circuit Court of Appeals is unreasonable.

III. Conclusion

In accordance with the foregoing, we affirm the Federal Railroad Administration's order interpreting the Hours of Service Act to provide that time spent waiting by a train crew for transportation to its point of release is "on duty" time to be counted toward the maximum 12 consecutive hours on duty allowed by the Hours of Service Act.

BAUER, *Circuit Judge*, dissenting: I respectfully dissent. I do not believe the agency's interpretation of the statute is reasonable. "The purpose of the Act is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R. Co. v. United States*, 247 U.S. 197, 199 (1918). The majority's interpretation of the Act impedes the efficiency of railroads and does nothing to advance the purpose of the Act.

Evidence was presented at the congressional hearings regarding the 1969 amendments to the Act that time spent waiting for deadhead transportation was not on-duty time. Further, the Senate Report of the amendments states that on-duty time was "time spent actually engaged in or connected to the movement of the train." S. Rep. No. 91-604, 91st Cong., 1st Sess. 8 (1969). This comports with the purpose of the act; the hazards of train operation occur when the train is moving.

Two specific aspects of the 1969 amendments to the Act serve to illuminate this determination. Time spent by an employee in deadhead transportation to begin a shift was categorized as time on-duty because this time could not be spent resting and thereby impacted the employee's physical and mental condition when operating a train at the end of a shift. Time spent by an employee in deadhead transportation after a shift, however, was categorized as limbo time because it neither effected the employee's ability to operate a train nor provided an opportunity for adequate rest. Time spent waiting for deadhead transportation is analogous to the latter and should be considered limbo time.

The majority affirms the FRA's interpretation solely on the basis of its reliance on the Ninth Circuit's opinion in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). But I believe *Skinner* is based on a faulty premise: that railroad crews waiting for deadhead transportation might be expected to perform additional duties

to further the completion of their assigned train's run. The cases cited by *Skinner*, 975 F.2d at 1426, address the categorization of time spent by a railroad crew waiting for repairs to be made or for some other delay before resuming its duties of operating the train; these cases held that the crews were on duty during the time they spent waiting. That reasoning makes sense considering the Act's goal of ensuring safety in the course of operating trains.

Outlawed crews waiting for deadhead transportation, however, have no further duties connected with *operating* the train. To the extent the outlawed crew remains on the train while it waits, it may be responsible for ensuring that the train is not looted or otherwise vandalized. But an outlawed crew is precluded from operating the train, technically by the statute and practically by the railroad. It is not unusual, though, for the outlawed crew to depart the train to wait nearby for deadhead transportation after a relief crew has arrived and assumed control of the train in order to bring the train to its destination. The interpretation of the Act by the majority, following *Skinner*, would include as on-duty time that time an outlawed crew spends in a saloon waiting for deadhead transportation, an activity that hardly contributes to the "excessive mental and physical strain" while engaged in or connected to the movement of a train. This interpretation is considerably removed from the statutory goal of safety in operating trains and is, in my opinion, unreasonable in light of the letter and spirit of the Act.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX C

[DoT Logo]

U.S. Department
of Transportation

Federal Railroad
Administration

Washington, D.C. 20590
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BY HAND

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Dear Mr. Blanchette:

As you are aware, on December 29, 1994, the United States Court of Appeals for the Seventh Circuit issued a decision in the case of *Atchison, Topeka, and Santa Fe Railway Co.* v. *Peña* (Nos. 93-1505, 93-2378, and 93-2712) (*en banc*).[1] This case concerns the Federal Railroad Administration's (FRA) interpretation of the Federal hours of service laws as they pertain to the status of train crewmembers waiting for the arrival of deadhead transportation to their point of final release. In response to the legal challenges filed in 1993 by nine major railroads, the Seventh Circuit Court of Appeals, sitting *en banc*, ruled unanimously against FRA and held that time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is *not* time on duty, but rather "limbo time" (*i.e.*, neither on- nor off-duty time). Slip opinion at page 13.

The Seventh Circuit's holding coincided with the position that FRA had traditionally taken until the agency

[1] The Seventh Circuit is comprised of Illinois, Indiana, and Wisconsin.

changed its interpretation in late 1992. Prior to that change, FRA had considered an employee to be on duty during the time spent waiting for the arrival of the deadhead vehicle *only* if the employee actually had duties to perform. If the railroad had relieved the employee of all responsibility, FRA had considered such time spent merely waiting for the deadhead vehicle to arrive as limbo time for hours of service purposes.

However, on September 22, 1992, in response to lawsuits filed by the United Transportation Union and the Brotherhood of Locomotive Engineers, a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that such time spent waiting for transportation is to be considered on-duty time. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992).[2] Although FRA disagreed with the Ninth Circuit's legal rationale, FRA recognized both the ambiguity of the Federal hours of service laws' pertinent provisions and the reasonableness of the court's ultimate conclusion as to the proper reading of those provisions. Accordingly, in the interest of uniform application of the Federal hours of service laws and to promote the safety of railroad operations, FRA decided to treat the Ninth Circuit's opinion as binding throughout the entire nation.

FRA has always believed that both the Ninth Circuit's interpretation of the relevant hours of service provisions, and what became the Seventh Circuit's interpretation, were reasonable. While FRA adopted the Ninth Circuit's interpretation primarily to achieve national uniformity, the decision of the Seventh Circuit has now made this goal impossible to achieve unless and until the United States Supreme Court resolves the split between the circuit courts. Moreover, upon review of the Seventh Circuit's unanimous, *en banc* decision, FRA concludes that

[2] The Ninth Circuit, of course, includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

the Seventh Circuit's reading of the pertinent hours of service provisions is better reasoned than the decision of the Ninth Circuit.

Accordingly, FRA has decided to adopt the Seventh Circuit's decision as its own view in every state in the nation located outside of the jurisdiction of the Seventh and Ninth Circuits, beginning at 12:01 a.m. on March 6, 1995.[3] FRA has chosen March 6 because it will allow sufficient time for FRA to notify its field inspectors and the regulated community of FRA's revised interpretation. FRA also believes that by selecting one uniform date for the remaining implementation of its revised interpretation the impact on both FRA and the regulated community will be kept to a minimum.

This means that *effective on March 6*, FRA will treat an employee merely required to remain on a train (at a location outside of the territory of the Ninth Circuit), while awaiting the arrival of deadhead transportation to a point of final release, as neither on nor off duty; the employee's status most closely resembles, and is part and parcel of, deadheading from duty. However, as FRA stressed in its August 4, 1989 letter (copy enclosed) to Mr. Lawrence Mann, counsel for the rail labor unions, if an employee is required to perform service of any kind during that period (*e.g.*, protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flogging, shutting down locomotives or checking fluid levels, or communicating train consist information via radio), he or she will be considered as on duty until all such service is completed. The Seventh Circuit's holding did not address the situation in which a crew that has expired under the Federal hours of service laws is called upon to perform nonoperational duties (*i.e.*, commingled duties) while it waits for the arrival of the

[3] However, since the Seventh Circuit issued the mandate in its decision on February 27, 1995, *see* Fed. R. App. P. 41, FRA began applying the revised interpretation inside the jurisdiction of the Seventh Circuit effective at 12:01 a.m. on that date.

deadhead vehicle after the expiration of the maximum 12 hours. However, in a footnote, the court made clear that "the statute accounts for that circumstance" by treating such time as time on duty. Slip opinion at page 10, footnote 4; *see* 49 U.S.C. § 21103. Of course, where a railroad's operating rules clearly relieve employees of all duties during the waiting period and no duties are specifically assigned, the waiting time will be considered limbo time.

Although it is FRA's expectation that the split between the Ninth and Seventh Circuits concerning their differing interpretations of the Federal hours of service laws will eventually be resolved by the United States Supreme Court, pending such resolution, FRA will, out of deference to the court of jurisdiction, continue to treat time spent merely waiting for the arrival of deadhead transportation to the point of final release as time on duty *when it occurs within the territory of the Ninth Circuit*. FRA will therefore expect affected railroads to record such time as time on duty and file reports of excess service, as necessary, under 49 C.F.R. Part 228.[4]

FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive performance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release.

[4] **Although time spent awaiting the arrival of deadhead transportation will still constitute time on duty within the territory of the Ninth Circuit, FRA will continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties.**

Accordingly, it is FRA's expectation that the railroads will voluntarily employ their best efforts to minimize the time that employees spend waiting for the arrival of deadhead transportation throughout the remainder of the United States.

We would appreciate your making this letter known to your member railroads. In due course, we will amend Appendix A to 49 C.F.R. Part 228 in accordance with the views stated herein.

Sincerely,

/s/ S. Mark Lindsey
S. MARK LINDSEY
Chief Counsel

Enclosure

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[DoT Logo]

U.S. Department
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Federal Railroad
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[Aug. 4, 1989]

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Dear Mr. Mann:

This is in response to your letters to Associate Administrator Joseph W. Walsh concerning FRA's interpretation of the Hours of Service Act as it applies to certain questions you have posed. I note at the outset that, like your questions, my responses are general in nature. Thus, this response should not be read as covering every factual variant that may arise. This letter does not concern the issue of duty calls to employees during off-duty periods. That issue is being addressed in a separate letter.

Remaining On A Train After Expiration of Twelve Hours On Duty

Most of your questions concern how the Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours. Under the Act, the time of an employee engaged in train and engine service falls within one of three categories: (1) on-duty time is time between reporting for duty and final release from duty (except time spent deadheading from duty) and includes time spent actually providing service to the railroad, whether in covered service or in commingled service, and time spent deadheading

to duty; (2) off-duty time is time actually available for rest, *i.e.*, time coming after the final release from duty, including time spent commuting to and from the employee's regular reporting point; and (3) time spent deadheading from duty to the point of final release ("limbo time"), which as provided in section 1(b)(3) of the Act, is neither time on duty nor time off duty.

Generally, an employee required to remain on a train while awaiting deadhead transportation to a point of final release is neither on nor off duty; he or she is in a situation that most closely resembles, and is part and parcel of, deadheading from duty. However, if an employee is required to perform service of any kind during that period, he or she is on duty until all such service is completed. Thus, the question in each case is whether the employee was required or permitted to provide any actual service to the railroad during the time spent awaiting deadhead transportation.

We are aware of case law suggesting that employees are on duty while awaiting the arrival of a relief crew even if they perform no duties for the railroad during that period. *E.g., Missouri, K. and T. Ry.* v. *United States*, 231 U.S. 112 (1913); and *United States* v. *Pennsylvania R.R.*, 275 F.Supp. 345 (W.D. Pa. 1967). However, those cases are distinguishable on their facts and/or no longer good law in light of the 1969 amendments to the Act. In *Missouri*, the Supreme Court rejected the railroad's argument that the train crew was not on duty during a period in which the "engine was sent off for water and repairs." 231 U.S. at 119. The Court concluded that the employees were "none the less on duty when inactive. Their duty was to stand and wait." *Id.* Thus, the case involved a crew's waiting for an engine to be ready after reporting for duty, a situation that FRA would clearly consider to be time on duty. Although its language is broad, *Missouri* simply does not address the status of a crew that is not performing service while

awaiting deadhead transportation. In fact, the year after *Misouri* was decided, an appellate court distinguished crew members "released from any and every duty in connection with the movement of the [train], and retired to rest upon the train," from a fireman called upon to serve as an engine watchman; only the fireman was considered to have been on duty. *Great Northern Ry. v. United States*, 211 F. 309, 311 (9th Cir. 1914).

In *Pennsylvania*, a district court relied on *Missouri* in holding that crew members awaiting deadhead transportation were on duty despite the facts that the railroad had expressly relieved them of responsibility at the expiration of their maximum legal duty period and they had performed no subsequent duties. In addition to being an overly broad extension of *Missouri*, this case is simply no longer on point in light of the 1969 amendments to the Act. Those amendments added, *inter alia*, a definition (at section 1(b)(3)(C)) of "time on duty" that includes time spent deadheading to duty but excludes, from both time on duty and time off duty, time spent by an employee in deadhead transportation "from duty to his point of final release." Thus, for the first time, the Act itself recognized that an employee's time may fall between the on-duty and off-duty categories and that not all time between reporting for duty and the final release is time on duty. It is important to note that, as originally introduced, both bills from which these amendments arose (H.R. 8449 and S. 1938) would have counted all deadhead time (to or from duty) as time on duty. However, Congress recognized that, provided the employee is given the required 8 or 10 hours off duty after final release, there is no safety detriment caused by treating deadheading time as neither on nor off duty. Accordingly, because the premise of *Pennsylvania, i.e.*, that all time between reporting for duty and final release is time on duty, was removed by the 1969 amendments, that case no longer provides useful guidance as to the current requirements of the Act.

There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation to the point of final release as part of the deadheading itself. Identical logic supports considering the two periods (awaiting deadhead and deadheading itself) as limbo time. Neither period is truly available for rest, so it cannot be considered time off duty. Nor is either period one in which actual service (covered or commingled) is performed, so there is no safety rationale for considering it time on duty. Moreover, if either period were considered time on duty, the railroads would have no incentive to cease the performance of all duties at the conclusion of the maximum on-duty period. That is, if the railroad would be subject to the same penalty for tying up the crew as it would be if it required the crew to continue in service, one might expect some railroads to simply keep the train moving to the point of final release under the control of employees who had already worked for 12 hours. We believe it is far safer, and more consistent with the intent of Congress, to give the railroad the incentive to relieve the employees of all duties by considering both time awaiting deadhead transportation and time spent deadheading to the final release point as limbo time. That way, the railroad has not committed a safety violation, safety itself is not impaired, and the statutory off-duty period is not encroached upon by periods that are not available for rest.

Performing Service While Awaiting Deadhead Transportation

The situation we have discussed above concerns employees in a status that some railroads describe as "relieved, but not released." There, employees are required to stay on their train to await transportation to the point of final release, but are expressly relieved of any duties. However, in some situations the railroad tells the crew to tie up but subsequently requires one or more members

to perform service. Any employee required or permitted to perform such duties would, of course, be on duty until all such duties were completed.

The analysis is easy where the railroad's representative expressly states, when ordering the crew to tie up or thereafter, that certain duties must be performed. It is also easy to analyze the opposite situation, *i.e.*, where the railroad representative expressly relieves the crew of all duties and merely requires them to stay with their train until deadhead transportation arrives.

But difficult questions arise where the dispatcher or other railroad official in charge is not so explicit. If, for example, a dispatcher merely tells the crew members to put their train in a siding and does not tell them they are relieved from duty, and the railroad's operating rules impose general duties such as observing passing trains or protecting the train from vandalism, the employees may not be relieved from duty. These difficult cases will require an examination of the particular railroad's practice concerning how crews are relieved from duty. On one railroad the practice may also be to simply tell the crew to tie up, which carries the message that the employees are—unless specifically ordered to perform a particular duty—completely relieved from duty and must merely await transportation. In fact, a railroad may have a standing policy that employees must relieve themselves from duty prior to exceeding their limit of duty hours, so that no specific order to that effect is necessary. On a different railroad, the practice may be that employees are not relieved from general duties such as observing passing trains unless an explicit order relieving them from duty is received.

Thus, sorting out these cases requires knowledge of specific facts from which FRA can determine whether the employees have been relieved of duties or not. If the order or message they receive is not explicit and the railroad has no standing instructions on how to construe

an order to tie up the train, FRA may have to consult the railroad's rules to find out what duties the employees might reasonably have been expected to perform, in the absence of specific orders, while awaiting transportation.

Aside from the question of whether the railroad required or permitted certain service, there is the question of what constitutes service. You list the following possible duties in your letters of August 17 and August 26, 1988:

- protecting the train against vandalism
- observing passing trains for any defects or unsafe condition
- flagging
- shutting down locomotives or checking fluid levels
- communicating train consist information via radio
- being "responsible for handling any issue which might arise while the train is not moving"
- doing paperwork
- monitoring engine radios

The fiirst five of these items clearly constitute duty if required or permitted by the railroad, but the last three beg the question of whether they actually and under all circumstances constitute duty. First, "being responsible for handling any issue which might arise" is vague. If the railroad had issued an order to that effect, that fact would probably be inconsistent with a conclusion that the railroad intended that the employee be relieved of all duties. If, however, the railroad had clearly relieved the employee but noted that he or she may be put back on duty should the need arise while awaiting the deadhead transportation, the employee would not be on duty again unless subsequently told to handle an issue that had arisen.

Second, "doing paperwork" when required or permitted to do so by the railroad is time on duty in commingled service. However, merely signing time returns, which ordinarily takes no more than a minute and occurs when the crew has reached its lodging and is about to begin its rest, is so minimal that it should not be considered as time spent doing paperwork.

Third, "monitoring engine radios" when required or permitted by the railroad to do so is time on duty for an employee given that responsibility, but does not include use of the radio initiated by the train crew to attend to such incidental matters as calling a van driver to give the train's location or ascertain how long a wait the crew will have before being picked up. Nor would an employee who chose to listen to radio transmissions after having been relieved of any responsibility to do so be considered as on duty.

I might also note that, in addition to having to determine whether an activity constituted service and was required or permitted by the railroad, FRA must also weigh the likely compliance impact and litigation risks in deciding whether to assess penalties.

You point out that there have been unspecified situations in which time spent awaiting deadhead transportation has been counted toward the required off-duty period. Time off duty begins at the point of final release, not while the employees are sitting on their train. FRA has permitted one very limited exception as a practical matter: if the time between being relieved of duty and arriving at an away-from-home lodging is 30 minutes or less, such a period can be included in time off duty. Our rationale is that, just as time off duty at a home terminal includes commuting time, so time off duty at an away-from-home terminal may include a reasonable allowance (30 minutes) for commuting. However, if the crew is not at the lodging within 30 minutes of being relieved from duty, the allowance is lost and the whole

period (awaiting deadhead and being deadheaded) is limbo time. This policy gives the railroads the incentive to get the employees off the train and to the lodging quickly, which seems to be a purpose you share.

You also claim that crews have been required to stay on their trains as long as 9 hours awaiting transportation. As long as no duties are performed and the full off-duty period is given once the crew arrives at the lodging, these situations are not violations of the Act. Nevertheless, except in the most extreme emergency, such situations are outrageous. I can only point out that, if FRA had substantive regulatory authority in the hours of service area, a regulation could be written to address that issue. For example, a rational rule might extend the required off-duty period by an hour for any hour spent awaiting transportation. Such a rule would discourage the practice that concerns you and possibly increase safety. However, the rigidity of the Act precludes our even considering such a rule.

Very truly yours,

/s/ Gregory B. McBride
GREGORY B. MCBRIDE
Assistant Chief Counsel
for Safety

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Howard Croft, ASLRA

bcc: RRS-1, 10
All regional directors
file (HS Act—general)

No. 94-1592

Supreme Court, U.S.
FILED
MAY 9 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioners, pursuant to Rule 15.7 of this Court's rules, hereby supplement their petition for a writ of certiorari as follows:

Subsequent to filing the petition, certain railroads filed a petition for review in the U.S. Court of Appeals for

the District of Columbia Circuit, seeking a decision on the exact underlying legal question presented to this Court in the undersigned's petition for a writ of certiorari. That is the third circuit court which has been asked to rule on the same issue. A copy of that petition is attached hereto as an Appendix.

In view of the above, we submit this as a further reason to grant the petition.

Respectfully submitted,

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May 9, 1995

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1238

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.
920 S.E. Quincy
Topeka, Kansas 66612

BURLINGTON NORTHERN RAILROAL CO.
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102,

SOUTHERN PACIFIC TRANSPORTATION CO.
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD CO.
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FEDERICO PEÑA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

JOLENE M. MOLITORIS
Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. §§ 2342(7) and 2344, the Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Railroad Company, Southern Pacific Transportation Company, and Union Pacific Railroad Company petition for review of final agency action by the Federal Railroad Administration (FRA), an agency within the Department of Transportation.[1] The FRA announced on March 1, 1995 that it will continue to enforce an interpretation of the Hours of Service Act, 49 U.S.C. §§ 21101-21107, 21303 (hereinafter HSA), against the Petitioners, even though it is collaterally estopped from asserting this interpretation against the Petitioners and the interpretation is contrary to the language and meaning of the statute.

Among the responsibilities of the FRA is the administration of the HSA, which imposes a twelve-hour limit on the time that train crews can continuously spend on-duty. 49 U.S.C. § 21103. Once a train crew has reached its twelve-hour maximum, it is relieved from further train operating duties, even if the train has not reached its final destination. The carrier then transports the relieved crew to a terminal and brings a relief crew to continue the train's journey. The transportation of a relieved crew back to its terminal is commonly referred to as deadhead transportation.

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[1] The Corporate Disclosure Statement required by Rule 26.1 of the Local Rules is attached hereto as exhibit B.

The HSA defines various time periods as on duty or off duty for purposes of computing the twelve-hour maximum. Section 21103(b)(4), added by the 1969 amendments to the HSA, provides that time spent in deadhead transportation at the end of a crew's tour of duty is neither on- nor off-duty time, but is what has come to be known as limbo time. Limbo time counts against neither the twelve-hour maximum nor the time off duty which must accumulate before a crew can be given a new assignment. From the enactment of the 1969 amendments until 1992, the FRA consistently treated time spent waiting for deadhead transportation from an assignment to be part of deadhead transportation and therefore limbo time. *See Atchison T. & S. F. Ry. v. Peña*, 44 F.3d 437, 440 (7th Cir. 1994) (en banc) (petition for cert. filed Mar. 28, 1995).

Two unions which represent train crew members, the Brotherhood of Locomotive Engineers and the United Transportation Union, challenged the FRA's treatment of waiting time in two court actions which were consolidated in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Petitioners were not parties to this litigation, which involved the unions and FRA. The Ninth Circuit rejected the FRA's consistent interpretation of the HSA and held that time spent waiting for deadhead transportation was time on duty under the HSA. Although disagreeing with the Ninth Circuit's rationale, the FRA, by letter dated October 28, 1992, announced that it would apply the Ninth Circuit's interpretation nationwide effective January 1, 1993.

Most of the country's largest railroads, including the Petitioners here, filed a petition in the Seventh Circuit for review of the FRA's decision to apply the changed HSA interpretation nationwide. The court, sitting en banc, rejected the FRA's new interpretive rule. *Peña*, 44 F.3d at 443-44. The Seventh Circuit held that time spent waiting for deadhead transportation by a relieved crew was not time on duty.

On March 1, 1995, the FRA issued a letter to the nation's railroads advising them that it will follow the Seventh Circuit's interpretation in all states except those comprising the Ninth Circuit. Letter of S. Mark Lindsay, Chief Counsel, March 1, 1995, at 3 (attached as Exhibit A). In the Ninth Circuit states, the FRA announced that it would continue to treat waiting time as time on duty and directed railroads operating in the Ninth Circuit, including Petitioners, to continue to report instances to FRA where train crews exceeded the twelve-hour maximum as a result of that treatment. *Id.*

The FRA's decision to impose the changed interpretation of the HSA on Petitioners in the Ninth Circuit is unlawful, because Petitioners and the FRA already litigated this issue in the Seventh Circuit and the FRA lost. The doctrine of mutual collateral estoppel prevents the Government from reasserting an issue against persons, who were parties to prior litigation with the Government, where that same issue was decided contrary to the Government and in favor of those persons, as in *Peña*. *United States v. Stauffer Chemical Co.*, 464 U.S. 164, 169-72 (1984). In contrast, the Ninth Circuit decision in *United Transp. Union v. Skinner* has no preclusive effect against the Petitioners, because they were not parties to that litigation. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979).

The FRA's March 1, 1995 action is also arbitrary and capricious and contrary to law.

The FRA's March 1, 1995 letter constitutes final agency action which has aggrieved the Petitioners and thus is reviewable under 28 U.S.C. §§ 2342(7) and 2344. The action is definitive, leaving no doubt regarding the interpretation of the HSA that the FRA will apply to the Petitioners in Ninth Circuit states. In the absence of a finding of invalidity, that interpretation will continue to have a direct and immediate adverse impact on the Petitioners. Indeed, the FRA has assessed penalties against

Petitioners for alleged violations of the HSA, based on its changed interpretation.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, which allows an appeal against FRA in the District of Columbia Circuit.

Therefore, the Petitioners request that, as to them, the Court enter an order that the FRA follow the HSA, as interpreted in *Peña*, in all Circuits, including the Ninth. Similarly, the Petitioners request that the Court suspend, modify or vacate that portion of the FRA's March 1, 1995 action which purports to apply to the Petitioners an interpretation of the HSA other than that adjudicated in *Peña*.

Respectfully submitted,

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April 28, 1995

RULE 26.1
CORPORATE DISCLOSURE STATEMENT

1. The Atchison, Topeka and Santa Fe Railroad Company's parent companies are Santa Fe Pacific Corporation and SFP Properties, Incorporated. The subsidiaries of The Atchison, Topeka and Santa Fe Railway Company, of Santa Fe Pacific Corporation, or of SFP Properties, Incorporated, other than those wholly owned by them, are:

Alameda Belt Line;
Belt Railway Company of Chicago;
Central California Traction Company;
Houston Belt & Terminal Railway Company;
Kansas City Terminal Railway Company;
Oakland Terminal Railway Company;
St. Joseph Terminal Railroad Company;
Sunset Railway Company;
Texas City Terminal Railway Company; and
Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.

2. Burlington Northern Railroad Company's parent company is Burlington Northern, Incorporated. The subsidiaries of Burlington Northern Railroad Company or of Burlington Northern, Incorporated, other than those wholly owned by them, are:

The Belt Railway Company of Chicago;
Camas Prairie Railroad Company;
Davenport, Rock Island and North Western Railway Company;
Houston Belt & Terminal Railway Company;
Iowa Transfer Railway Company;
Kansas City Terminal Railway Company;
Keokuk Union Depot Company;
Longview Switching Company;
M T Properties, Inc.;

Northern Radio Ltd.;
Paducah & Illinois Railroad Company;
Portland Terminal Railroad Company;
Terminal Railroad Association of St. Louis;
TTX Company; and
The Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.

3. Southern Pacific Transportation Company's parent company is Southern Pacific Rail Corporation. The subsidiaries of Southern Pacific Transportation Company or of Southern Pacific Rail Corporation, other than those wholly owned by them, are:

The Alton & Southern Railway Company;
Arkansas & Memphis Railway Bridge and Terminal Company;
Central California Traction Company;
Denver Union Terminal Railway Company;
Kansas City Terminal Railway Company;
The Ogden Union Railway & Depot Company;
Portland Terminal Railroad Company;
Portland Traction Company;
San Marco Pipeline Company
Southern Illinois and Missouri Bridge Company;
Sunset Railway Company;
Terminal Railroad Association of St. Louis; and
TTX Company.

There are no affiliates which have issued shares or debt securities to the public.

4. Union Pacific Railroad Company's parent company is Union Pacific Holdings Corporation, whose parent is Union Pacific Corporation. The subsidiaries of Union Pacific Railroad Company or of Union Pacific Corporation, other than those wholly owned by them, are:

Alameda Belt Line;
The Alton and Southern Railway Company;

Arkansas & Memphis Railway Bridge and
Terminal Company;
Automated Monitoring & Control International;
The Belt Railway Company of Chicago;
Brownsville & Matamoros Bridge Company;
Camas Prairie Railroad Company;
Central California Traction Company;
The Denver Union Terminal Railway Company;
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company;
Longview Switching Company;
Oakland Terminal Railway;
The Ogden Union Railway & Depot;
Portland Terminal Railway Company
Portland Traction Company;
St. Joseph Terminal Railroad Company;
Terminal Railroad Association of St. Louis;
Texas City Terminal Railway Company;
TTX Company; and
Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.

SUPREME COURT, U.S.
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No. 94-1592

In the Supreme Court of the United States

OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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29 pp

QUESTIONS PRESENTED

Whether time spent by members of a train crew waiting for transportation to their point of final release is counted as "time on duty" under the Hours of Service Act, Pub. L. No. 103-272, sec. 1D, 108 Stat. 887, to be codified at 49 U.S.C. 21101 *et seq.*

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a) is reported at 44 F.3d 437. The opinion of the court of appeals panel (Pet. App. 21a-28a) is reported at 29 F.3d 324.

JURISDICTION

The judgment of the court of appeals, following its en banc rehearing, was entered on December 29, 1994. The petition for a writ of certiorari was filed on

March 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hours of Service Act (HSA)[1] is designed to foster railroad safety by limiting the number of consecutive hours that any member of a train crew may remain on duty and by requiring specified amounts of off-duty time before such workers may return to duty. Thus, except in emergencies,

> a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty —
>
> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

49 U.S.C. 21103(a) (App., *infra*, 2a-3a). The present case concerns the appropriate treatment of time spent waiting for "deadhead transportation" at the conclusion of an employee's period of service.[2] Such waiting time may occur when a train crew "expires" —*i.e.*, reaches the end of the time period during which it may remain on duty—before the train and crew reach their scheduled destination. In such instances, the statute requires that the crew cease operating the train, so it must be stopped. The crew may then be required to wait, either on the train or elsewhere, for the arrival of a relief crew and for a means of transportation to the point of the expired crew's final release. See Pet. App. 3a.

As originally enacted in 1907, and continuing until its amendment in 1969, the Hours of Service Act implicitly divided all employee time into two categories —"on duty" or "off duty"—yet provided no express statutory definition of either term. See 45 U.S.C. 61 (1964). Early decisions held as a general matter that interim periods of idleness at the work site during which employees awaited further instructions were properly regarded as "on duty" time, but that time spent in deadhead transportation, both to and from the work site, was time "off duty." See, *e.g.*, *Missouri*,

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[1] At the time this suit was commenced, the Hours of Service Act was codified at 45 U.S.C. 61 *et seq.* (Supp. V 1993). During the pendency of the present action, Congress repealed the HSA, as part of a broad recodification of federal transportation laws. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. The repeals effected by the recodification do not apply, however, to "proceedings that were begun before the date of enactment of this Act." § 7(b), 108 Stat. 1379. Moreover, Congress made clear that the recodification is intended to effect no substantive changes in the affected laws, although it alters their arrangement and language in certain respects. See § 6(a), 108 Stat. 1378; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). The provisions of the HSA are to be codified chiefly in Chapter 211 of Title 49, United States Code. 49 U.S.C. 21101-21108. Other HSA provisions are to be codified at 49 U.S.C. 20102, 21303, and 21304. The provision of pivotal importance to the present action—45 U.S.C. 61(b)(3) (1988), which defined "time on duty"—are to be codified at 49 U.S.C. 21103(b). Sections 21101-21107 and 21303 are reproduced as an appendix to this brief. We will refer herein (as petitioners have) to the pertinent provisions as recodified.

[2] "Deadhead transportation" is transportation to or from a duty assignment, not including normal commuting time.

Kansas & Texas Ry. v. *United States*, 231 U.S. 112, 119 (1913); *United States* v. *Great Northern Ry.*, 285 F. 152 (9th Cir. 1922). There appears, however, to have been no clearly established answer to the question now at issue, regarding the proper characterization of time spent waiting for deadhead transportation. Although the railroads in the proceedings below offered anecdotal evidence that such time was treated as "off duty" time during that period (C.A. App. 68-69), the only reported judicial decision addressing the issue concluded that such waiting time should be considered time on duty. See *United States* v. *Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967).

Congress substantially amended the HSA in 1969, reducing the number of permissible hours on duty and providing, for the first time, a definition of "on duty" time. See 45 U.S.C. 61(b)(3) (1988). Congress dealt specifically with the issue of deadhead transportation time, adopting a compromise position between those advocated by union and industry groups. By virtue of that amendment, the statute in its current form provides that "[t]ime spent in deadhead transportation *to* a duty assignment is time on duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a) (emphasis added). The statute further provides that "time spent in deadhead transportation *from* a duty assignment to the place of final release is neither time on duty nor time off duty." *Ibid.* (emphasis added). This provision effectively creates a third category of time, commonly known as "limbo time." Limbo time does not count as on-duty time subject to the specified statutory maximum of on-duty hours during any one period of service, but it also does not count toward the statutory minimum of off-duty rest time that a crew member must be given prior to the beginning of the

next period of service. See Pet. App. 3a-4a. The 1969 amendments did not expressly state, however, whether time spent waiting for deadhead transportation from a duty assignment should also be treated as limbo time.

Subsequent to the 1969 amendments, and continuing until 1992, the Federal Railroad Administration (FRA) in the Department of Transportation took the position that, when a crew member is relieved of all responsibilities but is required to await the arrival of deadhead transportation to his or her point of final release, the time spent waiting should be considered limbo time. See Pet. App. 34a-41a (Letter from FRA Assistant Chief Counsel Gregory B. McBride to counsel for the present petitioners (Aug. 4, 1989)). The FRA took the position that such waiting time "most closely resembles, and is part and parcel of, deadheading from duty." *Id.* at 35a. As the FRA explained, such time cannot be considered off-duty time, because it does not afford a true opportunity for rest; yet there is little or no safety rationale for considering such time to be part of time on duty, as long as the crew member has no duties to perform. *Id.* at 37a. At the same time, however, the FRA made clear that the time spent waiting would be considered time on duty if the crew member was required to perform any service for the railroad. *Id.* at 37a-40a.

2. In 1990, petitioners United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE) filed lawsuits challenging the FRA's interpretation of the HSA on this issue. On appeal, the Ninth Circuit consolidated the two cases for decision, which it rendered in September 1992. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (1992) (*UTU*). The Ninth Circuit ruled in *UTU* that

the waiting time at issue must be counted as "time on duty" under the statute, concluding that it was "clear" that this result obtained prior to the 1969 HSA amendments and that those amendments evinced no congressional intent to alter the law on this point. See *id.* at 1426-1427. The court of appeals took note of the "contingent responsibilities" that crew members awaiting deadhead transportation may face, in that they "may be required to provide certain additional services for the railroad, should the need for any of those services arise." *Id.* at 1423, 1428.

The government did not seek review in this Court of the *UTU* decision, which was the first appellate ruling on the issue. The FRA, however, undertook to reevaluate its approach to the question, and the agency determined that it would apply the Ninth Circuit's interpretation of the statute on a nationwide basis. That shift in policy was announced in an October 28, 1992, letter from FRA Chief Counsel Mark Lindsey to Robert W. Blanchette, Vice President of the Association of American Railroads (C.A. App. 1-3), and was later explained in a notice published in the Federal Register. 58 Fed. Reg. 18,163 (1993).

In the Federal Register notice, the FRA stated that it did not agree with the legal rationale of the Ninth Circuit. See 58 Fed. Reg. 18,164 (1993). The FRA recognized, however, that the language of the statute does not provide an unambiguous characterization of time spent awaiting deadhead transportation, and that "the issue has always been a close one." *Ibid.* The FRA noted that application of the stricter interpretation could contribute to rail safety, insofar as it may reduce the number of lengthy waits for deadhead transportation, which in turn can contribute to the problem of cumulative fatigue from irregular

work schedules. *Ibid.* The FRA also noted that its experience in Oregon (where an injunction mandating the stricter approach had been in effect for more than a year) had allayed any concerns that this approach might induce railroads to keep "expired" crews working beyond the statutory limit, thereby disserving the safety purposes of the Act. *Ibid.* As the FRA has subsequently made clear, however, its primary rationale for adopting the Ninth Circuit's interpretation was simply to ensure "uniform application of the Act" to railroads operating in various parts of the nation. *Ibid.*; see Pet. App. 30a.

3. In 1993, nine major railroads initiated the present action, seeking direct review in the Seventh Circuit of the FRA's new policy, as announced in the Federal Register notice and in two other communications.[3] Initially, a divided panel of that court upheld the FRA's action. Pet. App. 21a-28a. The panel majority agreed that the agency's position was "reasonable and based on a permissible construction of the HSA" and stated that it "would be hard pressed to say that an agency's reliance upon the opinion of a Circuit Court of Appeals is unreasonable." *Id.* at 26a. One judge dissented, concluding that the agency's

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[3] The respondent railroads filed separate petitions for review of the Federal Register notice, an earlier FRA memorandum stating the agency's position on the issue, and the FRA's subsequent letter denying the railroads' Petition for Inter-pretation of the Hours of Service Act, which the FRA treated as a petition for rulemaking. See C.A. App. 13-17. The Seventh Circuit consolidated the three petitions and, in its en banc opinion, ruled that the FRA's interpretation constitutes "final agency action[]" reviewable under 28 U.S.C. 2342(7) (Supp. V 1993). Pet. App. 5a-6a.

revised interpretation of the statute was not reasonable. *Id.* at 27a-28a.

The respondent railroads sought rehearing en banc, which the court of appeals granted. Following reargument, the en banc court unanimously ruled in the railroads' favor. The majority of the en banc court concluded, as a preliminary matter, that the FRA's position was not entitled to substantial deference, in light of the history of the agency's treatment of the issue, including the purported inconsistency of the FRA's legal positions. Pet. App. 7a-10a. The majority went on to hold that, in any event, "the statute itself resolves this issue quite clearly." *Id.* at 10a. The majority observed that under the statute, time spent in deadhead transportation from a duty assignnent to the point of final release is not treated as time on duty (because fatigue at this point poses no immediate danger) but is also not treated as time off duty (because it does not afford any genuine opportunity for rest). *Id.* at 12a. The majority concluded that the time spent awaiting the arrival of deadhead transportation after the completion of operating responsibilities should similarly be counted as "limbo time," under the present statutory scheme, because the very same considerations apply to it. *Ibid.*

Three concurring judges took issue with the majority's comments about the FRA's purported inconsistency, noting that the agency had in fact adhered consistently to two distinct principles: (1) that the preferable interpretation of the statute is to treat the sort of waiting time at issue here as limbo time; and (2) that there is a substantial need for national uniformity in applying the statute, "given the integrated nature of the national railroad

system." Pet. App. 17a. The concurring judges concluded, however, that the FRA's decision to favor the value of uniformity (and accordingly to acquiesce in the Ninth Circuit's ruling in *UTU*) was not the sort of agency decision to which a court owes deference. *Id.* at 19a-20a.

4. In light of the en banc decision in the present case, the FRA has again reevaluated its position on this issue. In a March 1, 1995, letter to Robert W. Blanchette of the Association of American Railroads, FRA Chief Counsel Mark Lindsey indicated that in all parts of the nation outside the Ninth Circuit, the FRA would now revert to its original view that time spent awaiting deadhead transportation at the conclusion of an employee's period of service would be treated as limbo time. Pet. App. 29a-33a. The Chief Counsel's letter pointed out that the FRA had "adopted the Ninth Circuit's interpretation primarily to achieve national uniformity," but that the Seventh Circuit's ruling "has now made this goal impossible to achieve unless and until the United States Supreme Court resolves the split between the circuit courts." *Id.* at 30a. Accordingly, the FRA indicated that, outside the Ninth Circuit, it would follow its original view that time during which an employee is "merely required to remain on a train" awaiting deadhead transportation "most closely resembles, and is part and parcel of, deadheading from duty," and would therefore be counted as limbo time. *Id.* at 31a. At the same time, the FRA emphasized—consistent with its earlier pronouncements on this point—that, "if an employee is required to perform service of any kind during that period, * * * he or she will be considered as on duty until all such service is completed." *Ibid.* While expressing hope

that action by this Court would ultimately permit uniform application of the law, the FRA also indicated that it would continue, in the meantime, to adhere to the Ninth Circuit's ruling within the States constituting that circuit. *Id.* at 32a.

ARGUMENT

The result reached by the court of appeals represents the correct resolution of an admittedly difficult question of statutory interpretation. At the same time, however, the decision below creates a square conflict with the earlier decision of the Ninth Circuit in *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (1992) (*UTU*). In order to resolve that conflict, and to permit evenhanded application of the Hours of Service Act to railroads operating in various parts of the country, this Court should grant the petition for a writ of certiorari.

1. The Hours of Service Act is a federal regulatory statute that restricts the manner in which railroad operations may be conducted and provides for substantial penalties (see 49 U.S.C. 21303 (App., *infra*, 9a-11a)) in the event that railroads do not comply with those restrictions.[4] Resolution of the statutory issue posed by this case will have substantial effects on railroad operations, with implications both for the

[4] The Secretary of Transportation may impose a civil penalty of "at least $500 but not more than $10,000" for each violation of the Act. 49 U.S.C. 21303(a)(2) (App., *infra*, 9a). A penalty of up to $20,000 may be imposed when a grossly negligent violation or a pattern of repeated violations causes an imminent hazard of death or injury, or actually results in death or injury. *Ibid.* Civil penalties may be collected through actions brought by the Attorney General in federal district court. 49 U.S.C. 21303(b) (App., *infra*, 9a-10a).

costs that may be imposed on railroads and for rail safety. Because weather and equipment problems (along with serving the needs of railroad customers) can make exact planning difficult, the current disuniformity imposes significant additional uncertainty and costs upon railroads attempting to determine how crews are to be utilized.

For example, a weather-related delay may cause a train crew to expire within the Ninth Circuit rather than (as anticipated) after crossing the circuit boundary. The time spent waiting for the arrival of the deadhead vehicle would then be deemed on-duty time, and the railroad would face the possibility of severe civil penalties. To avoid the risk of penalties, the railroad might even be tempted to order the crew (whether explicitly or implicitly) to "cut corners" on railroad safety (*e.g.*, by operating at an excessive rate of speed) in order to exit the Ninth Circuit before the 12-hour limit was reached. Uniform application of this regulatory scheme to railroads operating in various parts of the country—and whose operations (and crews) cross circuit lines—is therefore highly desirable, both for the sake of fairness among railroads and to prevent confusion on the part of workers and managers regarding the requirements of the law. In light of the square conflict between the decisions of the Seventh and Ninth Circuits on this issue, resolution of the conflict by this Court is the only apparent way in which such uniformity can be achieved.[5]

[5] As petitioners' Supplemental Brief in Support of Petition for Certiorari points out, this issue has already spawned additional court of appeals litigation. Four of the railroad respondents in this case have filed a petition for review in the United

This case presents an appropriate occasion for resolution of the circuit conflict. The legal issue is purely a matter of statutory interpretation. In this connection, we wish at the outset to dispel the confusion that might otherwise be engendered by petitioners' presentation. Petitioners assert that during the sort of waiting time at issue here, crew members "typically" remain responsible for a variety of tasks, such as "protect[ing] the train against vandalism" and "assur[ing] that the brakes remain properly applied." Pet. 5-6. Respondent railroads, by contrast, have denied that operating responsibilities are regularly imposed on crew members awaiting the arrival of deadhead transportation to their point of final release. See C.A. Br. 21, 39; C.A. Supp. App. 71-72, 88.

In our view, however, that factual disagreement as to the frequency with which such crew members may be assigned various responsibilities is irrelevant to the legal question posed here. The FRA has consistently taken the position that *if* crew members

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States Court of Appeals for the District of Columbia Circuit, challenging the FRA's March 1, 1995, announcement that it will continue to abide by the *UTU* decision within the Ninth Circuit while treating the time in question as limbo time in the rest of the country. See pages 9-10, *supra*. Relying on *United States* v. *Stauffer Chemical Co.*, 464 U.S. 164, 169-172 (1984), the railroads contend that under the doctrine of mutual collateral estoppel, the FRA is required, with respect to railroads that were parties to the instant litigation, to abide by the Seventh Circuit's decision even within the Ninth Circuit. See Supp. Br. The continued litigation concerning this question is evidence both of the significance of the issue to the private parties involved and of the likelihood of wasteful and duplicative proceedings in the lower courts absent a definitive resolution by this Court.

awaiting deadhead transportation are assigned *any* duties to perform while waiting—even fairly passive duties such as "observing passing trains for any defects or unsafe condition"—then they will be considered to be on duty. See Pet. App. 39a-40a, 31a-32a. Accordingly, the only question presented in either the instant case or the *UTU* litigation has concerned the proper characterization of waiting time if additional duties are *not* actually imposed on crew members. The Ninth Circuit concluded that such crew members are nevertheless on duty, apparently on the theory that they are potentially subject to being called into service during the waiting period. See 975 F.2d at 1423-1424, 1428. The Seventh Circuit disagreed with that legal conclusion. See Pet. App. 11a-12a. Thus, the conflict between the courts of appeals concerns a purely legal issue, which this Court can and should resolve.

2. If this Court grants certiorari, the federal respondents will take the position (in accordance with the FRA's letter of March 1, 1995, see Pet. App. 29a-33a) that time spent waiting for deadhead transportation at the conclusion of an employee's period of service is properly regarded as neither on- nor off-duty time. That position, we acknowledge, is not consistent with the position taken by the FRA before the Seventh Circuit, in which the agency argued that the waiting time should be treated as time on duty. As the FRA has explained, however, the agency took that position in the court of appeals not because it was persuaded that this was the better reading of the HSA, but because it concluded (after the Ninth Circuit's decision in the *UTU* litigation) that the interest in nationwide uniformity tipped the balance in favor of accepting the alternative reading of the

statute. Now, however, the combined effect of the rulings of the Ninth and Seventh Circuits is to preclude such uniformity, unless and until this Court resolves the division in circuit authority. And if this Court grants the petition for a writ of certiorari, its resolution of the interpretive question will obviously have nationwide application, superseding the rulings of both the Seventh and the Ninth Circuits. There is consequently no longer any reason for the FRA to defend a construction of the statute that it believes, on the whole, to be the less persuasive.[6]

As both the court below and the FRA have explained, the treatment of the sort of waiting time at issue here as limbo time—neither on duty nor off duty—comports fully with both the statutory scheme and the safety policies that underlie it. Although Congress did not specifically address the issue at hand, its careful compromise regarding deadhead transportation time provides guidance as to the correct result. As long as train crew members are not called upon to perform tasks while they are waiting, such time is analogous to time spent in deadhead transportation to the point of final release, and is best regarded as part of that time. Crew members without

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[6] In light of the FRA's decision to revert to its initial position on the substantive issue presented, the case comes to this Court in a posture significantly different from that in which it arrived in the Seventh Circuit. Questions of deference to the FRA's judgment respecting the propriety of acquiescence for the sake of national uniformity are now largely beside the point. Rather, the sole issue presented for this Court's consideration is the underlying issue of statutory interpretation. The presence as parties of the petitioner unions ensures that the Court will have the benefit of an adversary presentation despite the agency's shift in position.

responsibilities pose no substantial danger even if they are fatigued, whether they are already in a deadhead vehicle or are awaiting the arrival of such a vehicle. In neither event, however, should such time be counted as off-duty time, because crew members cannot be expected to have any genuine opportunity for rest until they have been finally released, at their home base or other designated terminal.

Both the railroads and the unions have attempted in the prior proceedings to draw support from the ostensible treatment of time spent awaiting deadhead transportation during the period before the 1969 HSA amendments. The court of appeals correctly determined that evidence of pre-1969 practice is "unimportant." Pet. App. 12a. Because the pre-1969 statute did not provide for the third category of time (*i.e.*, time that is neither on nor off duty), practice under that statute can have little bearing on whether this new category applies to time spent awaiting deadhead transportation to the point of final release. Nor does the legislative history of the 1969 amendments provide any clear guidance on this point. In short, the statute should simply be interpreted, in accordance with a common sense application of its present language and structure, as treating the sort of waiting time at issue here as part and parcel of "time spent in deadhead transportation from a duty assignment to the place of final release," and hence "neither time on duty nor time off duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1995

APPENDIX

CHAPTER 211—HOURS OF SERVICE

§ 21101. Definitions

In this chapter—

(1) "designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) "dispatching service employee" means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) "employee" means a dispatching service employee, a signal employee, or a train employee.

(4) "signal employee" means an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.

(5) "train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

§ 21102. Nonapplication and exemption

(a) GENERAL.—This chapter does not apply to a situation involving any of the following:

(1) a casualty.

(2) an unavoidable accident.

(3) an act of God.

(4) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the em-ployee left a terminal.

(b) EXEMPTION.—The Secretary of Transporta-tion may exempt a railroad carrier having not more than 15 employees covered by this chapter from the limitations imposed by this chapter. The Secretary may allow the exemption after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.

§ 21103. Limitations on duty hours of train employees

(a) GENERAL.—Except as provided in sub-section (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—

(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time the employee is engaged in or connected with the movement of a train is time on duty.

(3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) EMERGENCIES.—A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this subsection, an emergency ends when the track is cleared and the railroad line is open for traffic.

§ 21104. Limitations on duty hours of signal employees

(a) GENERAL.—(1) In paragraph (2)(C) of this subsection, "24-hour period" means the period beginning when a signal employee reports for duty immediately after 8 consecutive hours off duty or, when required under paragraph (2)(B) of this subsection, after 10 consecutive hours off duty.

(2) Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a signal employee to remain or go on duty—

(A) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours;

(B) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(C) after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.

(3) Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters, is neither time on duty nor time off duty, except that up to one hour of that time spent returning from the final trouble call of a period of continuous or broken service is time off duty.

(4) If, at the end of scheduled duty hours, an employee has not completed the trip from the final outlying worksite of the duty period to the employee's headquarters or directly to the employee's residence, the time after the scheduled duty hours necessarily spent in completing the trip to the residence or headquarters is neither time on duty nor time off duty.

(5) If an employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with this section, the time necessary for the trip from the worksite to the employee's headquarters or directly to the employee's residence is neither time on duty nor time off duty.

(6) Time spent in transportation on an ontrack vehicle, including time referred to in paragraphs (3)-(5) of this subsection, is time on duty.

(7) A regularly scheduled meal period or another release period of at least 30 minutes but not more than one hour is time off duty and does not break the continuity of service of the employee under this section, but a release period of more than one hour is time off duty and does break the continuity of service.

(c) EMERGENCIES.—A signal employee may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service.

§ 21105. Limitations on duty hours of dispatching service employees

(a) APPLICATION.—This section applies, rather than section 21103 or 21104 of this title, to a train employee or signal employee during any period of time the employee is performing duties of a dispatching service employee.

(b) GENERAL.—Except as provided in subsection (d) of this section, a dispatching service employee may not be required or allowed to remain or go on duty for more than—

(1) a total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed; or

(2) a total of 12 hours during a 24-hour period in a tower, office, station, or place at which only one shift is employed.

(c) DETERMINING TIME ON DUTY.—Under subsection (b) of this section, time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is on duty in a tower, office, station, or other place is time on duty in that tower, office, station, or place.

(d) EMERGENCIES.—When an emergency ex-ists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours for not more than 3 days during a period of 7 consecutive days.

§ 21106. Limitations on employee sleeping quarters

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

§ 21107. Maximum duty hours and subjects of collective bargaining

The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

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CHAPTER 213—PENALTIES

SUBCHAPTER I—CIVIL PENALTIES

* * * * *

§ 21303. Chapter 211 violations

(a) PENALTY.—(1) Subject to section 21304 of this title, a person violating chapter 211 of this title is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. For a violation of section 21106 of this title, a separate violation occurs for each day a facility is not in compliance.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least $500 but not more than $10,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than $20,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) CIVIL ACTIONS TO COLLECT.—(1) The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section after satisfactory information is presented to the Attorney General. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an

individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action under this subsection must be brought not later than 2 years after the date of the violation unless administrative notification under section 3711 of title 31 is given within that 2-year period to the person committing the violation. However, even if notification is given, the action must be brought within the period specified in section 2462 of title 28.

(c) IMPUTATION OF KNOWLEDGE.—In any proceeding under this section, a railroad carrier is deemed to know the acts of its officers and agents.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 94-1592

In the Supreme Court of the United States
OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF RAILROAD RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is time spent by a train crew, which has been relieved from train operating duties, waiting for deadhead transportation, time on duty within the meaning of the Hours of Service Act, 49 U.S.C. § 21103(b)?

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RESPONSE OF RAILROAD RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Railroad Company, Consolidated Rail Corporation, CSX Transportation, Incorporated, Illinois Central Railroad Company, Norfolk Southern Railway Company, Norfolk and Western Railway Company, Southern Pacific Transportation Company, and

Union Pacific Railroad Company (hereafter "Railroads"),1/ which conduct about 90 percent of the nation's train operations, respectfully submit their views on the petition for a writ of certiorari and the supplemental brief in support of that petition filed by the Brotherhood of Locomotive Engineers and United Transportation Union (hereinafter "unions") to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437 (7th Cir. 1994).2/

COUNTERSTATEMENT OF THE CASE

The Hours of Service Act ("HSA") regulates the maximum hours that a train crew can be continuously on duty. Originally 16 hours, the HSA currently specifies 12 hours as the statutory maximum. 49 U.S.C. § 21103(a).3/ Not all train crews are always or even regularly required to work the maximum hours allowed by law during a tour of duty. On those occasions that it appears a crew will be

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1/ The Railroads filed the list required by Rule 29.1 of the Supreme Court Rules in their Application for Extension of Time to File a Response to Petition for Writ of Certiorari filed on April 26, 1995.

2/ The Railroads agree with the petition's list of parties, except that the list incorrectly uses the word "Railroad" rather than "Railway" in the name of Respondent The Atchison, Topeka and Santa Fe Railway Company.

3/ At the time of the Ninth and Seventh Circuit decisions, the HSA was found at 45 U.S.C. §§ 59-66 (1988). Subsequently, Congress enacted legislation which will recodify the Hours of Service Act at 49 U.S.C. §§ 20102, 21101-08, and 21303-04 without substantive amendment. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745.

unable to complete its assignment within the 12-hour maximum, a railroad instructs the crew to "tie-up" (*i.e.*, park) the train at a secure location before the crew reaches the 12-hour limit. The crew is thereafter relieved from any other train operating duties while it waits for transportation to return it to its reporting point (so-called "deadhead transportation"). J.A. at 88, 92-93, 95.

From the HSA's enactment in 1907 until the 1969 amendments to the HSA, this time spent waiting for deadhead transportation was not treated as time on duty to be counted toward the HSA maximum hours of service. After the 1969 amendments, the Federal Railroad Administration ("FRA"), which then assumed responsibility for the HSA, consistently treated this waiting time as neither time on duty or time off duty. *See* 49 U.S.C. § 21103(b). In other words, it was treated as "limbo" time. J.A. at 37.4/

Thus, Congress in the HSA accommodated two interests. Safety was addressed by limiting the consecutive hours a crew could be on duty. At the same time, by allowing railroads to utilize crews right up to the statutory maximum, Congress recognized that the vagaries of railroad operations required that railroads have flexibility in utilizing train crews.5/

4/ The Government Respondents refer to the Railroads' history of the HSA's application as "anecdotal." Federal Respondents' Brief at 4. This "anecdotal evidence was unrefuted and consisted of sworn statements of officials from the major railroads with personal knowledge of their railroad's historical operating practices and compliance with the HSA.

5/ For example, Congress refused rail labor's proposed amendment to the HSA which would have reduced the maximum hours of service below 12 hours. *See Railroad Safety Authorization for Fiscal Year 1979:*

In 1992, the Ninth Circuit suddenly altered this longstanding statutory scheme in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Contrary to the unions' characterization, Pet. at 4, the Ninth Circuit did not hold "that the HSA was violated by requiring a crew to stay on a train awaiting deadhead transportation." Rather, the court held that the time spent waiting for deadhead transportation was to be counted as time on duty. 975 F.2d at 1426. The FRA then decided to apply this new interpretation of the HSA nationwide. To implement the Ninth Circuit's new interpretation of the HSA, the FRA issued several directives to the railroad industry. Under these directives, the time spent waiting for deadhead transportation counted as time on duty regardless of whether the crew waited on the train or at some other location. According to the FRA, the crew was deemed to be on duty, even though no longer performing duties or, indeed, no longer on the train, until the deadhead transportation vehicle, typically a crew van or taxi, arrived at the crew's location.

The Railroads did not thereafter file "several petitions" with the FRA, as the unions erroneously state. Pet. at 4. The Railroads filed one petition with the FRA on March 26, 1993 showing that there was no legal or factual basis for the FRA to adopt a new nationwide statutory interpretation based on the Ninth Circuit's holding. The Railroads' petition was supported by affidavits from officials of the Railroads, who were familiar with the historical treatment of this waiting time. They explained that waiting time had never been

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Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 102-03, 166 (1978) (testimony of FRA Administrator and Chairman of the Railway Labor Executives' Ass'n).

treated as time on duty, either before or after the 1969 HSA amendments.

The Railroads also explained the severe practical problems that would follow from the FRA's nationwide acquiescence in the Ninth Circuit's re-interpretation of the HSA. Before the FRA's new statutory interpretation, railroads had a safe harbor within which they could utilize crews without violating the HSA. For more than 80 years, there was no violation as long as the crew was relieved from duty prior to reaching the maximum limit. Now railroads had to predict not only when a crew would reach the maximum HSA limit, but how much time would be needed to dispatch transportation to meet that crew before it reached the 12-hour limit. As a practical matter, railroads could no longer be assured of the ability to use crews up to the 12-hour limit when necessary to meet exigencies caused by weather and other scheduling delays. Railroads also had to build in time before a crew reached its limit in order to arrange transportation, often to remote locations, or risk violation of the HSA under the FRA's new interpretation. J.A. at 50-51.

The Railroads supplemented their FRA petition on May 19, 1993, after the FRA published a Federal Register Notice repeating its decision to apply the Ninth Circuit's HSA interpretation nationwide. Even though the Railroads' petition to the FRA had been filed two weeks before this Federal Register Notice, the FRA made no mention of it in the Notice. The Railroads' supplement also explained that they were incurring thousands of instances of excess service under the changed statutory interpretation despite their efforts to comply.

Even though the unions were served with the Railroads' petition and supplement, they opted not to participate in the

FRA's proceedings on the Railroads' petition to the FRA. They eventually intervened as parties in the Seventh Circuit proceedings and submitted briefs and participated in oral argument.

SUMMARY OF ARGUMENT

The unions are seeking certiorari on the bases of a split between the Seventh and Ninth Circuits and an alleged "serious railroad safety issue." The Railroads neither support nor oppose certiorari. The Railroads are filing this response pursuant to Rule 15 of the Court's Rules, because the unions' claimed serious safety issue is premised on numerous factual misstatements and improper extra-record materials and has no basis whatsoever.

ARGUMENT

I. The Seventh Circuit Decision Is Correct

The Seventh Circuit's unanimous en banc decision is clearly the correct interpretation of the HSA. Unlike the Ninth Circuit, the Seventh Circuit's decision is based on an analysis of the HSA's statutory language, purposes, and history. The Seventh Circuit's decision is also consistent with the 80-year practice of *not* counting time waiting for deadhead transportation by a relieved crew as time on duty under the HSA. In contrast, the Ninth Circuit's decision was based primarily on a misreading of inapposite cases under the HSA. The Ninth Circuit also had the disadvantage of not having before it a complete record of the historical treatment

of time waiting for deadhead transportation, first as time off duty and then, after the 1969 Amendments, as limbo time.

The FRA has indicated that it will apply the Seventh Circuit's interpretation of the HSA in all Circuits, except the Ninth. Pet. at 31a. The Railroads take no position on whether this Court should resolve the split in FRA's enforcement scheme at this time.6/

II. No Serious Railroad Safety Issue Is Presented By This Case

The Railroads object to the unions' claim that the Seventh Circuit's decision presents a serious safety issue requiring this Court's attention. The unions' safety arguments are improperly based on materials that are outside the record in

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6/ The four western railroads that were party to *Peña*, however, have appealed the FRA's decision to apply an interpretation of the HSA which is contrary to that adjudicated in *Peña* to their operations in the Ninth Circuit. On April 28, 1995, these railroads filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging this most recent FRA application of the HSA. Contrary to the unions' assertions in their supplemental brief in support of their petition for certiorari, the western railroads' petition does not ask the D.C. Circuit to review the same issue of interpretation as raised in *Peña*. Rather, the sole, narrow issue raised is whether the doctrine of mutual collateral estoppel precludes the FRA from reasserting against the western railroads an interpretation of waiting time which differs from that adjudicated against the FRA in *Peña*. Supp. Brief at 4a; *see United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); *but see id.* at 178 (White, J., concurring).

this case and, in any event, that do not support their contention.7/

That the Seventh Circuit's interpretation of the HSA does not present a "serious railroad safety issue" is best illustrated by the fact that the FRA consistently applied this same statutory interpretation for more than 24 years prior to *United Transp. Union v. Skinner*. If the treatment of waiting time presented a safety issue, surely the FRA would have noticed it and brought it to Congress's attention during one of its numerous appearances at congressional hearings. In fact, the Government conceded in the en banc oral argument that it had no evidence or statistics that the amount of time spent waiting for deadhead transportation at the end of a crew's shift had ever contributed to a railroad accident. The lack of any evidence of a safety problem led the Seventh Circuit to admonish that the FRA "cannot now rely on post hoc rationalizations regarding safety to justify its abrupt decision to alter its interpretation." *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc). The court further concluded that the FRA's statutory change "imposed a significant hardship on the railroads without contributing to railroad safety." *Id.* at 444.

The unions nonetheless argue to this Court that it was "common" for railroads to leave crews on trains for excessively long periods while waiting for deadhead transportation. The unions also contend that such crews still were on duty. Pet. at 5. The unions then join these claims

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7/ Nor is there a basis for the Government Respondents' suggestion that the Railroads are going to "cut corners," jeopardizing lives and property in order to beat the clock by speeding trains out of the Ninth Circuit. Federal Respondents' Brief at 11.

with the assertion that irregular work hours and sleep patterns create a safety hazard. As supposed evidence of the hazard to rail safety, the unions cite two newspaper articles and an assortment of articles on the sleep habits of employees with irregular or unpredictable shifts. Pet. at 6, 8-13. None of this so-called "evidence" was in the record below. As previously explained, the unions chose not to participate in the agency proceedings which led to this case. The only record evidence was that submitted by the Railroads. That uncontradicted evidence showed that the Railroads try to avoid or minimize waiting time for deadhead transportation and that, once relieved from duty, a train crew is not required to perform further train operating duties. J.A. 25-26, 27. Moreover, there is no dispute that, if a train crew is given train duties after reaching the 12-hour limit, the HSA is violated. The narrow legal issue presented by the Railroads' appeal was whether time waiting for deadhead transportation at the end of a crew's shift was time on duty when that crew had no such duties.

The unions' articles discussing safety were attached for the first time to their Seventh Circuit brief and, thus, were not part of the record below. The record before the Seventh Circuit consisted of the record developed in the agency proceedings on the Railroads' Petition to the FRA. The record before this Court is the same. The unions, having elected to wait and to participate as parties only at the appellate level, are required to take the record as it existed. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("'[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *Esch v. Yeutter*,

876 F.2d 976, 991 (D.C. Cir. 1989); *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).8/

Moreover, the miscellaneous newspaper and other anecdotal materials relied upon by the unions for an alleged safety issue in this case do not even relate to time waiting for deadhead transportation by a relieved train crew. For example, neither accident report on which the unions rely, Pet. at 10-12, recommends that waiting time be classified as time on duty. Another article, dealing with sleep disorders, makes no mention of the railroad industry, much less of any effect the classification of time spent waiting for deadhead transportation might have on rail safety. Natalie Angier, *Cheating on Sleep: Modern Life Turns America into the Land of the Drowsy*, N.Y. Times, May 15, 1990, at C1, C8.

The general thrust of the unions' extra-record materials is that irregular work cycles can contribute to fatigue. This issue is completely different from whether the time spent waiting by a train crew for transportation at the end of its shift must be counted as duty time for purposes of the HSA. The HSA does not regulate the time of day at which a crew can be called to duty, other than to mandate minimum rest periods between tours of duty.

The unions' safety argument really is a generalized policy argument properly addressed, if anywhere, to Congress, not the courts, as the Seventh Circuit recognized. *Peña*, 44 F.3d at 444 ("[T]he appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act.").

8/ These cases allow certain narrow exceptions to the general rule that review is limited to the administrative record, but none applies here.

CONCLUSION

The Railroads neither support nor oppose certiorari. However, to the extent this Court considers whether to grant certiorari in this case, that consideration should be based solely on the split in the circuits. This case does not present "a serious safety issue" requiring the Court's attention.

Respectfully submitted,

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June 2, 1995

No. 94-1592

(5)

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*,
and
FEDERICO PENA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED MARCH 27, 1995
CERTIORARI GRANTED JUNE 19, 1995

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378 and 93-2712
Consolidated

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, *et al.*,

Petitioners

v.

FEDERICO PENA, Secretary of Transportation, S. MARK LINDSEY, Acting Administrator, Federal Railroad Administration, FEDERAL RAILROAD ADMINISTRATION, *et al.*,

Respondents

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,

Intervening-Respondents

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	Case No. 93-1505
3/2/93	Petition for Review docketed. Filed Orig. and 3c of petitioner's Petition for Review. [93-1505] [463891-1] Appearance form due on 4/1/93 for Lawrence M. Mann, for Stuart M. Gerson, for S. Mark Lindsey, for Rosalind A. Knapp, for Brenda J. Council, for Ronald M. Johnson, for Robert S. Bogason, for William P. Stallsmith, for Ronald A. Lane, for James D. Tomola, for Andrew P. Cocoran, for John B. Rossi, for Lawrence M. Stroik, for Guy Vitello. Agency record or cert. list due on 4/12/93 for Federico Pena, for Department Transport, for S. Mark Lindsey, for Federal Railroad. (carl) [93-1505]

DATE	PROCEEDINGS
3/2/93	Filed clerk's copy of notice of service on counsel for respondent. [93-1505] [463891-1] (carl) [93-1505]
3/15/93	Added attorney John F. Daly and Malcolm L. Stewart per appearance form for Respondents Federico Pena, Mark Lindsey, Federal Railroad, and DOTP. (kolb) [93-1505]
3/15/93	Appearance form filed for Respondents Federico Pena, S. Mark Lindsey, Federal Railroad, DOTP by attorneys Malcolm L. Stewart, John F. Daly. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Added attorney Mark V. Holden per appearance form for Petitioners Atchison, Topeka, et al. (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioners Atchison, Topeka, et al., by attorneys Ronald M. Johnson and Mark V. Holden. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioner Atchison, Topeka by attorney Guy Vitello. [93-1505] [463891-1] (kolb) [93-1505]
3/16/93	Added attorneys Lawrence M. Stroik, Thomas J. Knapp, and W. Douglas Werner per appearance form for Petitioners Atchison, Topeka, et al. (kolb) [93-1505]
3/16/93	Appearance form filed for Petitioners Atchison, Topeka, et al. by attorneys Thomas J. Knapp, W. Douglas Werner, and Lawrence M. Stroik. [93-1505] [463891-1] (kolb) [93-1505]
3/17/93	Filed motion by Brotherhood of Locomotive Engineers and United Transportation Union to intervene. [468947-1] [93-1505] (carl) [93-1505]
3/17/93	Added attorney Steven M. Weisbaum per appearance form for Notice-Only (Brotherhood of Locomotive Engineers, United Transportation Union. (kolb) [93-1505]

DATE	PROCEEDINGS
3/17/93	Appearance form filed for Notice-Only (Brotherhood of Locomotive Engineers, United Transportation Union) by attorneys Steven M. Weisbaum, Lawrence M. Mann. [93-1505] [463891-1] (kolb) [93-1505]
3/18/93	Added attorneys David Herbert Kasminoff, Daniel C. Smith, and Billie Ann Stultz per appearance form for Respondent Federal Railroad. (kolb) [93-1505]
3/18/93	Appearance form filed for Respondent Federal Railroad by attorney Billie Ann Stultz, Daniel C. Smith, David Herbert Kasminoff. [93-1505] [463891-1] (kolb) [93-1505]
3/25/93	ORDER issued GRANTING motion to intervene, and the Brotherhood of Locomotive Engineers and United Transportation Union may participate in this appeal as intervening respondents. [468947-1 [93-1505] (carl) [93-1505]
4/8/93	Filed motion by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific to abate petition for review. [476166-1] [93-1505] (carl) [93-1505]
4/13/93	ORDER: Filed clerk's notice to Federal Railroad, Brohd Locomotive, United Transportatio[*] to file O&3 copies of response to MOTION TO HOLD PETITION FOR REVIEW IN ABEYANCE. [93-1505] [477647-1] Response due 4/20/93 for United Transportatio, for Brohd Locomotive, for Federal Railroad (carl) [93-1505]

[*] "Transportation" is misspelled throughout the Relevant Docket Entries.

DATE	PROCEEDINGS
4/20/93	Filed Respondent Federico Pena, Respondent S. Mark Lindsey, Respondent Federal Railroad, Respondent DOTP response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to hold the briefing schedule IN ABEYANCE. [480350-1] Document [477647-1] [93-1505] [480350-1] (carl) [93-1505]
4/20/93	Filed Respondent Federico Pena, Respondent S. Mark Lindsey, Respondent Federal Railroad, Respondent DOTP response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to abate case. [480359-1] Document [477647-1] [93-1505] [480359-1] (carl) [93-1505]
4/21/93	ORDER issued GRANTING motion to abate case and the petition for review is HELD IN ABEYANCE pending a further court order. Petitioners shall file, on or before June 15, a status report advising the court whether the agency has issued a decision on petitioners "petition for interpretation," and its impact on this appeal. [476166-1] [93-1505] (carl) [93-1505]
4/21/93	Filed intervening respondents United Transportation Union and Brotherhood of Locomotive Engineers response to Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific motion to abate case. [480756-1] Document [93-1505] [480756-1] (carl) [93-1505]
6/16/93	Filed status report by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific. [93-1505] [500094-1] (fran) [93-1505]
6/16/93	Order re: Status report of 6/16/93. Counsel for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific are ordered to file a further status report. [463891-1] [93-1505] Status report due on or before 7/16/93 for Union Pacific, for Southern Pacific, for Norfolk & Western, for Norfolk Southern, for IL Central Railroad, for CSX Transportation, for Consolidated Rail, for Burlington Northern, for Atchison, Topeka (fran) [93-1505]
6/24/93	ORDER: GRANTING motion to abate case [500593-1] in 93-2378 The court orders these appeals CONSOLIDATED for purposes of briefing and disposition and further proceedings in this matter are HELD IN ABEYANCE. Petitioners shall file, on or before 7/16/93, a status report advising this court whether the agency has issued a decision on petitioners' Petition for Interpretation, and, if so, its impact on this appeal. [93-1505, 93-2378] [500593-1] (carl) [93-1505 93-2378]
6/24/93	[93-1505, 93-2378] [463891-1] Status report due on or before 7/16/93 for Union Pacific in 93-1505,

DATE	PROCEEDINGS
	for Southern Pacific in 93-1505, for Norfolk & Western in 93-1505, for Norfolk Southern in 93-1505, for IL Central Railroad in 93-1505, for CSX Transportation in 93-1505, for Consolidated Rail in 93-1505, for Burlington Northern in 93-1505, for Atchison, Topeka in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk & Western in 93-2378, for Norfolk Southern in 93-2378, for IL Central Railroad in 93-2378, for CSX Transportation in 93-2378, for Consolidated Rail in 93-2378, for Burlington Northern in 93-2378, for Atchison, Topeka in 93-2378, per 6/24/93 order. (carl) [93-1505 93-2378]
7/16/93	Filed status report by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505. [93-1505] [509874-1] (odea) [93-1505]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712. [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for

DATE	PROCEEDINGS
	Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712. [510209-1]

DATE	PROCEEDINGS
	[93-1505, 93-2378, 93-2712) (duda) [93-1505, 93-2378, 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1] 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix) [93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712]
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief,

DATE	PROCEEDINGS
	if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et. al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]
12/14/93	Filed motion by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378, 93-2712]

DATE	PROCEEDINGS
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief, if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93-2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, February 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J. P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F.

DATE	PROCEEDINGS
	Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712] [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25c petitioners' Enbanc Petition for Rehearing tendered. [626371-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378,

DATE	PROCEEDINGS
	Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportation in 93-1505, for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1]

DATE	PROCEEDINGS
	in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1] (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk &

DATE	PROCEEDINGS
	Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Lawrence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378 Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712 . [93-1505, 93-2378, 93-2712] [510209-1] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section # 40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this

DATE	PROCEEDINGS
	case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712. Petitioner Norfolk Southern in 93-2712. Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 motion to stay the man-

DATE	PROCEEDINGS
	date. [684805-1] [93-1505, 93-2378, 93-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]
1/20/95	ORDER issued GRANTING motions to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued on 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs. (WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]
	Case No. 93-2378
6/7/93	Petition for Review docketed. Filed Original and 3 copies of petitioner's Petition for Review. [93-2378] [497798-1] Appearance form due on 7/7/93 for Lawrence M. Mann, for John F. Daly, for S. Mark Lindsey, for Rosalind A. Knapp, for Janet Reno, for Brenda J. Council, for Mark V. Holden, for Ronald M. Johnson, for Robert S. Bogason, for William P. Stallsmith, for Ronald A. Lane, for James D. Tomola, for John B. Rossi, for Lawrence M. Stroik, for Guy Vitello. Agency record or cert. list due on 7/19/93 for Department Transport. (cint) [93-2378]
6/7/93	Filed clerk's copy of notice of service on counsel for respondent. [93-2378] [497798-1] (cint) [93-2378]
6/16/93	Filed motion by Brotherhood of Locomotive Engineers and United Transportation Union to intervene. [502798-1] [93-2378] (chry) [93-2378]
6/17/93	Filed motion by Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific to abate case. [500593-1] [93-2378] (roxa) [93-2378]

DATE	PROCEEDINGS
6/17/93	Appearance form filed for Respondent Department Transport by attorney Billie Ann Stultz, Daniel C. Smith, David Herbert Kasminoff. [93-2378] [497798-1] (cfre) [93-2378]
6/17/93	Appearance form filed for Petitioner Atchison, Topeka, et al., by attorney Mark V. Holden, Ronald M. Johnson. [93-2378] [497798-1] (patb) [93-2378]
6/18/93	Added attorney Malcolm L. Stewart for Respondent Department Transport, per appearance form. (roxa) [93-2378]
6/18/93	Appearance form filed for Respondent Department Transport by attorney Malcolm L. Stewart, John F. Daly. [93-2378] [497798-1] (roxa) [93-2378]
6/24/93	Added attorney Steven M. Weisbaum for Respondent Department Transport, per appearance form. (roxa) [93-2378]
6/24/93	Appearance form filed for Respondent Department Transport by attorney Steven M. Weisbaum, Lawrence M. Mann. [93-2378] [497798-1] (roxa) [93-2378]
6/24/93	ORDER: GRANTING motion to abate case [500593-1] in 93-2378 The court orders these appeals CONSOLIDATED for purposes of briefing and disposition and further proceedings in this matter are HELD IN ABEYANCE. Petitioners shall file, on or before 7/16/93, a status report advising this court whether the agency has issued a decision on petitioners' Petition for Interpretation, and, if so, its impact on this appeal. [93-1505, 93-2378] [500593-1] (carl) [93-1505 93-2378]
6/24/93	[93-1505, 93-2378] [463891-1] Status report due on or before 7/16/93 for Union Pacific in 93-1505, for Southern Pacific in 93-1505, for Norfolk & Western in 93-1505, for Norfolk Southern in

DATE	PROCEEDINGS
	93-1505, for IL Central Railroad in 93-1505, for CSX Transportation in 93-1505, for Consolidated Rail in 93-1505, for Burlington Northern in 93-1505, for Atchison, Topeka in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk & Western in 93-2378, for Norfolk Southern in 93-2378, for IL Central Railroad in 93-2378, for CSX Transportation in 93-2378, for Consolidated Rail in 93-2378, for Burlington Northern in 93-2378, for Atchison, Topeka in 93-2378, per 6/24/93 order. (carl) [93-1505 93-2378]
6/25/93	ORDER issued GRANTING motion to intervene and the Brotherhood of Locomotive Engineers and the United States Union may participate in this appeal as intervening respondents. [502798-1] [93-2387] (carl) [93-2378]
7/16/93	Filed status report by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transpotration in 93-1505, Petitioner Consolidated Rail in 93-1505. [93-1505] [509874-1] (odea) [93-1505]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712. [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Trans-

DATE	PROCEEDINGS
	portation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner

DATE	PROCEEDINGS
	Southern Pacific in 93-2712. [510209-1] [93-1505, 93-2378, 93-2712] (duda) [93-1505 93-2378 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1]. 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505,

DATE	PROCEEDINGS
	for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix)

DATE	PROCEEDINGS
	[93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712]
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-

DATE	PROCEEDINGS
	2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief, if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
12/14/93	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93,2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, February 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J.P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific,

DATE	PROCEEDINGS
	Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712 [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Re-

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	spondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25c petitioners' Enbanc Petition for Rehearing tendered. [626371-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL

DATE	PROCEEDINGS
	Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportation in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505,

DATE	PROCEEDINGS
	for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1] (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion

DATE	PROCEEDINGS
	entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Laurence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378, Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section # 40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respond FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN 93-2712, Respondent FRA in 93-2712 motion to stay the mandate. [684805-1] [93-1505, 93-2378, 23-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
1/20/95	ORDER issued GRANTING motion to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued in 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs. (WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]
	Case No. 93-2712
7/16/93	Petition for Review docketed. Filed Original and 3 copies of petitioner's Petition for Review. [93-2712] [510209-1] Appearance form due on 8/16/93 for Lawrence M. Mann, for Billie Ann Stultz, for Daniel C. Smith, for David Herbert Kasminoff, for John F. Daly, for Rosalind A. Knapp, for Janet Reno, for Mark V. Holden, for Ronald M. Johnson. Agency record or cert. list due on 8/25/93 for Federico Pena, for Department Transport, for Grady C. Cothen, for Federal Railroad. (cfre) [93-2712]
7/16/93	Filed clerk's copy of notice of service on counsel for respondent. [93-2712] [510209-1] (cfre) [93-2712]
7/16/93	Filed motion by Petitioners Atchison, Topeka, Burlington Northern, Consolidated Rail, CSX Transportation, IL Central Railroad, Norfolk & Western, Norfolk Southern, and Southern Pacific

DATE	PROCEEDINGS
	to consolidate cases. [510240-1] [93-2712] (cfre) [93-2712]
7/21/93	ORDER: The court orders these appeals [93-1505, 93-2378, 93-2712] CONSOLIDATED for purposes of briefing and disposition. Record preparation and briefing on the merits shall proceed in accordance with Fed. R. App. P. 17 and 31. [510209-1] (patb) [93-1505 93-2378 93-2712]
7/23/93	Appearance form filed by attorney(s) Mark V. Holden in 93-2712, Ronald M. Johnson in 93-2712 for Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712. [93-2712] [510209-1] (elea) [93-2712]
7/26/93	Appearance form filed by attorney(s) Billie Ann Stultz in 93-2712, Daniel C. Smith in 93-2712, David Herbert Kasminoff in 93-2712 for Respondent Federal Railroad in 93-2712. [93-2712] [510209-1] (patb) [93-2712]
7/29/93	Added attorney Steven M. Weisbaum in 93-2712 for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712, per appearance form. (patb) [93-2712]
7/29/93	Appearance form filed by attorney(s) Steven M. Weisbaum in 93-2712, Lawrence M. Mann in 93-2712 for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712. [93-2712] [510209-1] (patb) [93-2712]

DATE	PROCEEDINGS
8/13/93	Added attorney Malcolm L. Stewart per appearance form. Appearance form filed for Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 by attorney Malcolm L. Stewart in 93-2712, John F. Daly in 93-2712. [93-2712] [510209-1] (cint) [93-2712]
8/25/93	Certified List filed by Respondent Federal Railroad in 93-1505, Respondent TRAN in 93-2378, Respondent Federal Railroad in 93-2712 . [93-1505, 93-2378, 93-2712] [521232-1] The first brief in this appeal is due 10/4/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk and Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (eric) [93-1505 93-2378 93-2712]
10/5/93	Brief deficiency letter sent to Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern

DATE	PROCEEDINGS
	in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 92-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 [510209-1] [93-1505, 93-2378, 93-2712] (duda) [93-1505 93-2378 93-2712]
10/12/93	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern

DATE	PROCEEDINGS
	Pacific in 93-2712 to file first brief in agency appeal. [536122-1]. 15c petitioner's brief 10c appendix tendered. [536122-1] [93-1505, 93-2378, 93-2712] (roxa) [93-1505 93-2378 93-2712]
10/12/93	ORDER issued GRANTING instanter motion to file first brief in agency appeal. [536122-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the petitioners' consolidated brief. [93-1505, 93-2378, 93-2712] [536122-1] 1. The second agency brief is due 11/12/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The reply brief, if any, is due 11/26/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Consolidated Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (elea) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/12/93	Filed 15c agency #1 brief by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536413-1] (carl) [93-1505 93-2378 93-2712]
10/12/93	Filed 10c appendix by Petitioner Union Pacific, et al., in 93-1505, 93-2378 and 93-2712, per order. [93-1505, 93-2378, 93-2712] [536420-1] (carl) [93-1505 93-2378 93-2712]
10/15/93	Filed oversize exhibit in Section 40 of exhibit room. Number of boxes: 1 (briefs; appendix) [93-1505, 93-2378, 93-2712] [510209-1] (cove) [93-1505 93-2378 93-2712]
10/18/93	Filed motion by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 for summary affirmance. [537863-1] [93-1505, 93-2378] (roxa) [93-1505 93-2378]
10/22/93	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific, et al. in 93-1505, 93-2378 and 93-2712. response to Respondent United Transportatio in 93-1505, Respondent Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378 motion for summary affirmance. [539615-1] [93-1505, 93-2378, 93-2712] [539615-1] (carl) [93-1505 93-2378 93-2712
11/3/93	Filed motion by Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to extend time to file second brief in agency appeal. [542750-1] [93-1505, 93-2378, 93-2712] (jess) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
11/5/93	ORDER issued GRANTING motion for extension of time to file second brief in agency appeal. [542750-1] in 93-1505, 93-2378, 93-2712 [93-1505, 93-2378, 93-2712] 1. The second brief is due 12/3/93 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Brohd Locomotive in 93-2378, for United Trans Union in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. 2. The consolidated reply brief, if any, is due 12/17/93 for Atchison, Topeka in 93-1505, for Burlington Northern in 93-1505, for Consolidated Rail in 93-1505, for CSX Transportation in 93-1505, for IL Central Railroad in 93-1505, for Norfolk Southern in 93-1505, for Norfolk & Western in 93-1505, for Southern Pacific in 93-1505, for Union Pacific in 93-1505, for Union Pacific in 93-2378, for Southern Pacific in 93-2378, for Norfolk Southern in 93-2378, for Norfolk & Western in 93-2378, for Atchison, Topeka in 93-2378, for Burlington Northern in 93-2378, for Consolidated Rail in 93-2378, for CSX Transportation in 93-2378, for IL Central Railroad in 93-2378, for Southern Pacific in 93-2712, for Norfolk Southern in 93-2712, for Norfolk & Western in 93-2712, for IL Central Railroad in 93-2712, for CSX Transportation in 93-2712, for Rail in 93-2712, for Burlington Northern in 93-2712, for Atchison, Topeka in 93-2712. (jess) [93-1505 93-2378 93-2712]
11/8/93	ORDER issued DENYING motion for summary affirmance. [537863-1] in 93-1505, 93-2378 [93-1505, 93-2378, 93-2712] (cfre) [93-1505 93-2378 93-2712]
12/3/93	Filed 15c agency #2 brief by Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378. [93-1505, 93-2378, 93-2712] [552825-1] (patb) [93-1505 93-2378 93-2712]
12/10/93	Filed 15c agency #2 brief by Respondent United Transportatio et. al., in 93-1505, in 93-2712, in 93-2712. [93-1505, 93-2378, 93-2712] [555339-1] (patb) [93-1505 93-2378 93-2712]
12/14/93	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, in 93-2378, in 93-2712, to extend time to file reply brief. [555967-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
12/15/93	ORDER issued GRANTING motion for extension of time to file third brief in agency appeal [555967-1] in 93-1505, 93-2378, 93-2712. ak [93-1505, 93-2378, 93-2712] The reply brief, if any, is due 12/23/93 for Atchison, Topeka in 93-1505, in 93-2378, in 93-2712. (patb) [93-1505 93-2378 93-2712]
12/27/93	Filed 15c reply brief by Petitioner Atchison, Topeka, et. al., in 93-1505, in 93-2378, in 93-2712. [93-1505, 93-2378, 93-2712] [560614-1] (patb) [93-1505 93-2378 93-2712]
1/21/94	ORDER: Argument set for Tuesday, Febuary 22, 1994 at 9:30 a.m. 20 minutes to Santa Fe and 20 minutes to Federal Railroad Admin. and union. [93-1505, 93-2378, 93-2712] [566785-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Daniel A. Manion, Chief Judge J. P. Gilbert. [93-1505, 93-2378, 93-2712] [576856-1] (broo) [93-1505 93-2378 93-2712]
2/22/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington North-

DATE	PROCEEDINGS
	ern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Petitioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [463891-1] (broo) [93-1505 93-2378 93-2712]
2/24/94	Agency record on appeal filed. Contents of record: 1 envelope administrative record. [93-1505, 93-2378, 93-2712] [577965-1] (chuc) [93-1505 93-2378 93-2712]
3/8/94	Supplemental record on appeal filed. Contents of record: 1 envelope Administrative record. [93-1505, 93-2378, 93-2712] [20188-1] (chuc) [93-1505 93-2378 93-2712]
7/13/94	Filed opinion of the court by Judge Gilbert. AFFIRMED. Bauer, dissenting, Manion, Gilbert, [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
7/13/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [622115-1] (patb) [93-1505 93-2378 93-2712]
7/21/94	Filed Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 Bill of Costs in the amount of $73.15. [93-1505, 93-2378, 93-2712] [510209-1] (eric) [93-1505 93-2378 93-2712]
7/27/94	Filed instanter motion by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 to file Petition for Rehearing Enbanc. [626371-1] 25 petitioners' Enbanc Petition for Rehearing tendered. [626371-

DATE	PROCEEDINGS
	1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
7/27/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712, per order. Dist. [93-1505, 93-2378, 93-2712] [626608-1] (carl) [93-1505 93-2378 93-2712]
7/28/94	Sent clerk's copy of letter to Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 requesting 25c of their Answer to the

DATE	PROCEEDINGS
	Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the petitioners' on 7/27/94. [93-1505, 93-2378, 93-2712] [626633-1] Answer to Petition for Enbanc Rehearing due 8/11/94 for Federico Pena in 93-1505, for TRAN in 93-1505, for S. Mark Lindsey in 93-1505, for Federal Railroad in 93-1505, for Brohd Locomotive in 93-1505, for United Transportatio in 93-1505, for TRAN in 93-2378, for Federal Railroad in 93-2712, for Grady C. Cothen in 93-2712, for TRAN in 93-2712, for Federico Pena in 93-2712. (carl) [93-1505 93-2378 93-2712]
7/28/94	ORDER issued GRANTING instanter motion to file Petition for Rehearing Enbanc. [626371-1] in 93-1505, 93-2378, 93-2712 The clerk of this court is directed to file instanter the tendered copies of the Petition for Rehearing with Suggestion for Rehearing En Banc. [626371-1] ak [93-1505, 93-2378, 93-2712] (conw) [93-1505 93-2378 93-2712]
8/11/94	Filed 25c Answer of Respondent Federal Railroad in 93-1505, Respondent S. Mark Lindsey in 93-1505, Respondent TRAN in 93-1505, Respondent Federico Pena in 93-1505, Respondent TRAN in 93-2378, Respondent Federico Pena in 93-2712, Respondent TRAN in 93-2712, Respondent Grady C. Cothen in 93-2712, Respondent Federal Railroad in 93-2712 to Petition for Rehearing with Suggestion for Rehearing Enbanc, per order. Dist. [93-1505, 93-2378, 93-2712] [631311-1) (elea) [93-1505 93-2378 93-2712]
8/11/94	Filed Respondent United Transportatio in 93-1505, Respondent Brohd Locomotive in 93-1505, Respondent United Trans Union in 93-2378, Respondent Brohd Locomotive in 93-2378, opposition to Petitioner Union Pacific et al., Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] [510209-1] (carl) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
8/30/94	ORDER: Petitioners Union Pacific, et al. in 93-1505, Petitioners IL Central Railroad, et al. in 93-2378, Petitioners Atchison, Topeka, et al. in 93-2712 Petition for Rehearing with Suggestion for Rehearing Enbanc is GRANTED. IT IS FURTHER ORDERED that the judgment and opinion entered in this case on 7/13/94 be VACATED. This case will be reheard en banc at the convenience of the court. The Honorable Walter J. Cummings did not participate in the consideration or decision of this Petition for Rehearing En Banc. [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
9/26/94	ORDER: Argument set for Tuesday, October 18, 1994 at 10:00 a.m. Each side limited to 15 minutes. [93-1505, 93-2378, 93-2712] [645842-1] (broo) [93-1505 93-2378 93-2712]
10/7/94	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 Citation of Additional Authority, per CR 28(j). Dist. [93-1505, 93-2378, 93-2712] [649692-1] (patb) [93-1505 93-2378 93-2712]

DATE	PROCEEDINGS
10/18/94	Case heard and taken under advisement by panel: Enbanc [93-1505, 93-2378, 93-2712] [662540-1] (broo) [93-1505 93-2378 93-2712]
10/18/94	Case argued by Ronald M. Johnson for Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Southern Pacific, Petitioner Union Pacific in 93-1505, John F. Daly for Respondent Federico Pena, Respondent TRAN, Respondent S. Mark Lindsey, Respondent Federal Railroad in 93-1505, Ronald M. Johnson for Petitioner Union Pacific, Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner Atchison, Topeka, Petitioner Burlington Northern, Petitioner Consolidated Rail, Petitioner CSX Transportation, Petitioner IL Central Railroad in 93-2378, John F. Daly for Respondent TRAN in 93-2378, Lawrence M. Mann for Respondent TRAN, Respondent Brohd Locomotive, Respondent United Trans Union in 93-2378, Lawrence M. Mann for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, John F. Daly for Respondent Federal Railroad, Respondent Grady C. Cothen, Respondent TRAN, Respondent Federico Pena in 93-2712, Ronald M. Johnson for Petitioner Southern Pacific, Petitioner Norfolk Southern, Petitioner Norfolk & Western, Petitioner IL Central Railroad, Petitioner CSX Transportation, Peti-

DATE	PROCEEDINGS
	tioner Consolidated Rail, Petitioner Burlington Northern, Petitioner Atchison, Topeka in 93-2712. [93-1505, 93-2378, 93-2712] [510209-1] (broo) [93-1505 93-2378 93-2712]
12/6/94	Filed oversized record in Section #40 of exhibit room: 1 box containing assorted briefs. [510209-1] [93-1505, 93-2378, 93-2712] (cove) [93-1505 93-2378 93-2712]
12/29/94	Filed opinion of the court by Judge Bauer. The petitions for review of the railroads are GRANTED and the orders of the Federal Railroad Administration are VACATED. Enbanc, Posner, concurring, Easterbrook, concurring, Manion, concurring. (The Hon. Walter J. Cummings did not participate in the argument or decision in this case.) [93-1505, 93-2378, 93-2712] [510209-1] (patb) [93-1505 93-2378 93-2712]
12/29/94	ORDER: Final judgment filed per opinion. With costs: y. [93-1505, 93-2378, 93-2712] [678052-1] (patb) [93-1505 93-2378 93-2712]
1/18/95	Filed motion by Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 to stay the mandate. [684347-1] [93-1505, 93-2378, 93-2712] (elea) [93-1505 93-2378 93-2712]
1/19/95	Filed Petitioner Union Pacific in 93-1505, Petitioner Southern Pacific in 93-1505, Petitioner Norfolk & Western in 93-1505, Petitioner Norfolk Southern in 93-1505, Petitioner IL Central Railroad in 93-1505, Petitioner CSX Transportation in 93-1505, Petitioner Consolidated Rail in 93-1505, Petitioner Burlington Northern in 93-1505, Petitioner Atchison, Topeka in 93-1505, Petitioner IL Central Railroad in 93-2378, Petitioner CSX Transportation in 93-2378, Petitioner Consolidated

DATE	PROCEEDINGS
	Rail in 93-2378, Petitioner Burlington Northern in 93-2378, Petitioner Atchison, Topeka in 93-2378, Petitioner Norfolk & Western in 93-2378, Petitioner Norfolk Southern in 93-2378, Petitioner Southern Pacific in 93-2378, Petitioner Union Pacific in 93-2378, Petitioner Atchison, Topeka in 93-2712, Petitioner Burlington Northern in 93-2712, Petitioner Consolidated Rail in 93-2712, Petitioner CSX Transportation in 93-2712, Petitioner IL Central Railroad in 93-2712, Petitioner Norfolk & Western in 93-2712, Petitioner Norfolk Southern in 93-2712, Petitioner Southern Pacific in 93-2712 response to Respondent FRA in 93-1505, Respondent TRAN in 93-1505, Respondent TRAN in 93-2378, Respondent TRAN in 93-2712, Respondent FRA in 93-2712 motion to stay the mandate. [684805-1] [93-1505, 93-2378, 93-2712] [684805-1] (elea) [93-1505 93-2378 93-2712]
1/20/95	ORDER issued GRANTING motion to stay the mandate. The mandate is STAYED to and including 2/19/95. [684347-1] [684805-1] in 93-1505, 93-2378, 93-2712 AM [93-1505, 93-2378, 93-2712] (carl) [93-1505 93-2378 93-2712]
2/27/95	AGENCY CLOSING LETTER ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $73.15. RECORD TO BE RETURNED LATER. (Contents to be returned: 2 envelopes administrative record.) [93-1505, 93-2378, 93-2712] [684805-1] (jonp) [93-1505 93-2378 93-2712]
3/3/95	The court, on its own motion, VACATES the Bill of Costs issued on 2/27/95 in the amount of $73.15. [497798-1] AK [93-1505, 93-2378, 93-2712] (jonp) [93-1505 93-2378 93-2712]
3/6/95	Filed instanter motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to file bill of costs.

DATE	PROCEEDINGS
	(WITHDRAWN per 3/10/95 order.) [700477-1] [93-1505, 93-2378, 93-2712] [700477-1] (patb) [93-1505 93-2378 93-2712]
3/7/95	Filed motion by Petitioner Atchison, Topeka, et al., in 93-1505, Petitioner Atchison, Topeka, et al., in 93-2378, Petitioner Atchison, Topeka, et al., in 93-2712 to withdraw motion for bill of costs instanter. [701670-1] [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
3/10/95	ORDER issued GRANTING motion to withdraw and "PETITIONERS' MOTION TO FILE BILL OF COSTS INSTANTER", filed on 3/6/95, is WITHDRAWN. [701670-1] [700477-1] AK [93-1505, 93-2378, 93-2712] (patb) [93-1505 93-2378 93-2712]
4/3/95	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [709776-1] (jame) [93-1505 93-2378 93-2712]
6/22/95	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 94-1592. [93-1505, 93-2378, 93-2712] [737067-1] (carl) [93-1505 93-2378 93-2712]

INTERSTATE COMMERCE COMMISSION

THE HOURS-OF-SERVICE ACT

(AS AMENDED)

AND ADMINISTRATIVE RULINGS
AND OPINIONS THEREON

[ICC Logo]

Washington
Government Printing Office
1926

CONFERENCE RULINGS ON THE HOURS-OF-SERVICE LAW BY THE COMMISSION

April 7, 1908.

56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.—Upon inquiry whether the hours-of-service law applies to electric street car lines which are interstate carriers: *Held*, That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See Rule 287.)

May 5, 1908.

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Rule 287-*b*.)

June 25, 1908.

88. HOURS-OF-SERVICE LAW.—(*a*) The specific proviso of the law in regard to hours of service is:

> "That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four-hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Rule 287.)

(*b*). Section of the law provides that:

> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (*This ruling rescinded by conference ruling adopted April 9, 1917.*)

November 10, 1908.

108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See Rule 287.)

BEST AVAILABLE COPY

April 4, 1910.

275. HOURS-OF-SERVICE LAW—TRAIN BAGGAGEMEN. —The provisions of section 1 of the hours-of-service law apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See Rules 74 and 287.)

March 16, 1908.

287. THE HOURS-OF-SERVICE LAW.—(*a*) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See Rule 56.)

(*b*) SEC. 2. The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four-hour period. Such twenty-four-hour period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by Rule 74.)

(*c*) The act does not specify the classes of employees that are subject to its terms. All employees engaged in

or connected with the movement of any train as described in section 1 are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block-signal operators, etc., come within the provisions of the statute. (Qualified by Rules 108 and 275; see also Rule 88.)

(*d*) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. In order to preserve the obvious intent of the law this provision must be construed to include all employees who, by the use of an electrical current, handle train orders or signals which control movements of trains. (See Rule 88.)

(*e*) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

(*f*) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and vice versa.

The statute is remedial in its intent and must have a broad construction so that the purpose of the Congress may not be defeated.

(*g*) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day

and a portion of the night a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime.

(*h*) The act provides that operators employed at night and day stations or at daytime stations may, in case of emergency, be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier can not guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(*i*) SEC. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (*This ruling rescinded by conference ruling adopted April 9, 1917.*)

> "Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)
>
> Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

(*j*) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer

or agent thereof, requiring or permitting any employee to go, be, or remain on duty" in violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(*k*) SEC. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oats, to issue subpoenas, and to interrogate witnesses.

February 12, 1912.

342. HOURS-OF-SERVICE LAW.—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive, or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours-of-service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train despatcher for instructions is in accord with the act and with the Commission's order of interpretation of June 25, 1908, *Held*, That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency.

[October 20, 1977, letter to J.R. Snyder from Raymond James]

[Oct. 20, 1977]

Mr. J. R. Snyder
National Legislative Director
United Transportation Union
400 First St., N.W., Suite T9-4
Washington, D.C. 20001

Dear Mr. Snyder:

This will respond to your letter to Mr. Furphy of October 4, 1977, posing two questions concerning the administration and enforcement of the Hours of Service Act (45 U.S.C. 61-64b). Your letter indicated that the questions were originated by United Transportation Union General Chairman J.D. McBride of the Missouri-Kansas-Texas Railroad.

The first question is whether the Hours of Service Act requires that crews whose twelve hours have expired be speedily deadheaded to a designated terminal for rest. As you know, this is a question which the law does not address explicitly. The only case which we have been able to identify which treats this issue is *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Penn. 1967). In that instance crew members were ordered to relieve themselves at the expiration of sixteen hours on duty and were informed that transportation would be provided. Due to heavy snow and low temperatures the crew "could not exercise their right to move freely from the train." A relief crew did not arrive for about three hours. Under these circumstances the court held that the carrier "held five of its employees within its scope of authority and direction for more than (the statutory maximum) and that it did so in violation of 45 U.S.C. § 62."

However, there are real practical problems in applying the rule of *Pennsylvania R.R.* to the wide range of situations in which employees are forced to await deadhead transportation following the expiration of the statutory period. First, the *Pennsyvania R.R.* decision provides no real guidance concerning how much delay is too much or what objective conditions represent an unreasonable restriction on the freedom of crew members, once relieved, to go their own way. Second, carried to its logical conclusion the rule of *Pennsylvania R.R.* would actually tend to promote the unsafe use of fatigued crews beyond the statutory maximum. Faced with the prospect that delays (avoidable or otherwise) in getting relief crews to trains might be viewed by the FRA as violations in themselves, carriers might elect to continue such crews to their destinations. Of course, it is the objective of the statute to deter precisely this conduct.

For the above-stated reasons, and because no concrete detriment to railroad safety is ordinarily involved, FRA has traditionally viewed most delays associated with deadheading as part of time spent in deadhead transportation. We believe that this approach offers the best hope for promoting overall compliance with the law. Of course, no time spent awaiting transportation to a designated terminal could be counted toward a required off duty period.

The second question posed by Mr. McBride asked what pressure FRA could bring to bear to promote humane treatment by encouraging prompt deadheading to a designated terminal. The safety of life and limb is the most fundamental element of humane treatment; and our mandate is to promote safety by enforcing railroad safety statutes and regulations. Government, like any private association, is subject to practical limitations on what it can accomplish. In addition, any agency of government is limited by the authority conferred upon it. The practical and legal limitations under which we work do not

permit us to deal with the particular issue which you have raised, absent a clear violation of the law.

Thank you for your continuing interest in railroad safety.

Sincerely,

/s/ Raymond K. James
RAYMOND K. JAMES
Chief Counsel

[August 4, 1988, letter to Lawrence M. Mann from Gregory McBride]

U.S. Department of Transportation

Federal Railroad Administration

[Aug. 4, 1988]

Lawrence M. Mann, Esq.
Alper & Mann
Suite 811
400 First St., N.W.
Washington, D.C. 20001

Dear Mr. Mann:

This is in response to your letters to Associate Administrator Joseph W. Walsh concerning FRA's interpretation of the Hours of Service Act as it applies to certain questions you have posed. I note at the outset that, like your questions, my responses are general in nature. Thus, this response should not be read as covering every factual variant that may arise. This letter does not concern the issue of duty calls to employees during off-duty periods. That issue is being addressed in a separate letter.

Remaining On A Train After Expiration Of Twelve Hours On Duty

Most of your questions concern how the Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours. Under the Act, the time of an employee engaged in train and engine service falls within one of three categories: (1) on-duty time is time between reporting for duty and final release from duty (except time spent deadheading from duty) and includes time spent actually providing service to the railroad, whether in covered service or in commingled service, and time spent deadheading to duty; (2) off-duty time is time actualiy available for rest, *i.e.*,

time coming after the final release from duty, including time spent commuting to and from the employee's regular reporting point; and (3) time spent deadheading from duty to the point of final release ("limbo time"), which as provided in section 1(b)(3) of the Act, is neither time on duty nor time off duty.

Generally, an employee required to remain on a train while awaiting deadhead transportation to a point of final release is neither on nor off duty; he or she is in a situation that most closely resembles, and is part and parcel of, deadheading from duty. However, if an employee is required to perform service of any kind during that period, he or she is on duty until all such service is completed. Thus, the question in each case is whether the employee was required or permitted to provide any actual service to the railroad during the time spent awaiting deadhead transportation.

We are aware of case law suggesting that employees are on duty while awaiting the arrival of a relief crew even if they perform no duties for the railroad during that period. *E.g., Missouri, K. and T. Ry.* v. *United States,* 231 U.S. 112 (1913); and *United States* v. *Pennsylvania R.R.,* 275 F.Supp. 345 (W.D. Pa. 1967). However, those cases are distinguishable on their facts and/or no longer good law in light of the 1969 amendments to the Act. In *Missouri,* the Supreme Court rejected the railroad's argument that the train crew was not on duty during a period in which the "engine was sent off for water and repairs." 231 U.S. at 119. The Court concluded that the employees were "none the less on duty when inactive. Their duty was to stand and wait." *Id.* Thus, the case involved a crew's waiting for an engine to be ready after reporting for duty, a situation that FRA would clearly consider to be time on duty. Although its language is broad, *Missouri* simply does not address the status of a crew that is not performing service while awaiting deadhead transportation. In fact, the year after *Missouri* was decided, an appellate court distinguished

crew members "released from any and every duty in connection with the movement of the [train], and retired to rest upon the train," from a fireman called upon to serve as an engine watchman; only the fireman was considered to have been on duty. *Great Northern Ry.* v. *United States,* 211 F. 309, 311 (9th Cir. 1914).

In *Pennsylvania,* a district court relied on *Missouri* in holding that crew members awaiting deadhead transportation were on duty despite the facts that the railroad had expressly relieved them of responsibility at the expiration of their maximum legal duty period and they had performed no subsequent duties. In addition to being an overly broad extension of *Missouri,* this case is simply no longer on point in light of the 1969 amendments to the Act. Those amendments added, *inter alia,* a definition (at section 1(b)(3)(C)) of "time on duty" that includes time spent deadheading to duty but excludes, from both time on duty and time off duty, time spent by an employee in deadhead transportation "from duty to his point of final release." Thus, for the first time, the Act itself recognized that an employee's time may fall between the on-duty and off-duty categories and that not all time between reporting for duty and the final release is time on duty. It is important to note that, as originally introduced, both bills from which these amendments arose (H.R. 8449 and S. 1938) would have counted all deadhead time (to or from duty) as time on duty. However, Congress recognized that, provided the employee is given the required 8 or 10 hours off duty after final release, there is no safety detriment caused by treating deadheading time as neither on nor off duty. Accordingly, because the premise of *Pennsylvania, i.e.,* that all time between reporting for duty and final release is time on duty, was removed by the 1969 amendments, that case no longer provides useful guidance as to the current requirements of the Act.

There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation

to the point of final release as part of the deadheading itself. Identical logic supports considering the two periods (awaiting deadhead and deadheading itself) as limbo time. Neither period is truly available for rest, so it cannot be considered time off duty. Nor is either period one in which actual service (covered or commingled) is performed, so there is no safety rationale for considering it time on duty. Moreover, if either period were considered time on duty, the railroads would have no incentive to cease the performance of all duties at the conclusion of the maximum on-duty period. That is, if the railroad would be subject to the same penalty for tying up the crew as it would be if it required the crew to continue in service, one might expect some railroads to simply keep the train moving to the point of final release under the control of employees who had already worked for 12 hours. We believe it is far safer, and more consistent with the intent of Congress, to give the railroad the incentive to relieve the employees of all duties by considering both time awaiting deadhead transportation and time spent deadheading to the final release point as limbo time. That way, the railroad has not committed a safety violation, safety itself is not impaired, and the statutory off-duty period is not encroached upon by periods that are not avaliable for rest.

Performing Service While Awaiting Deadhead Transportation

The situation we have discussed above concerns employees in a status that some railroads describe as "relieved, but not released." There, employees are required to stay on their train to await transportation to the point of final release, but are expressly relieved of any duties. However, in some situations the railroad tells the crew to tie up but subsequently requires one or more members to perform service. Any employee required or permitted to perform such duties would, of course, be on duty until all such duties were completed.

The analysis is easy where the railroad's representative expressly states, when ordering the crew to tie up or thereafter, that certain duties must be performed. It is also easy to analyze the opposite situation, *i.e.*, where the railroad representative expressly relieves the crew of all duties and merely requires them to stay with their train until deadhead transportation arrives.

But difficult questions arise where the dispatcher or other railroad official in charge is not so explicit. If, for example, a dispatcher merely tells the crew members to put their train in a siding and does not tell them they are relieved from duty, and the railroad's operating rules impose general duties such as observing passing trains or protecting the train from vandalism, the employees may not be relieved from duty. These difficult cases will require an examination of the particular railroad's practice concerning how crews are relieved from duty. On one railroad the practice may be to simply tell the crew to tie up, which carries the message that the employees are—unless specifically ordered to perform a particular duty—completely relieved from duty and must merely await transportation. In fact, a railroad may have a standing policy that employees must relieve themselves from duty prior to exceeding their limit of duty hours, so that no specific order to that effect is necessary. On a different railroad, the practice may be that employees are not relieved from general duties such as observing passing trains unless an explicit order relieving them from duty is received.

Thus, sorting out these cases requires knowledge of specific facts from which FRA can determine whether the employees have been relieved of duties or not. If the order or message they receive is not explicit and the railroad has no standing instructions on how to construe an order to tie up the train, FRA may have to consult the railroad's rules to find out what duties the employees might reasonably have been expected to perform, in the absence of specific orders, while awaiting transportation.

Aside from the question of whether the railroad required or permitted certain service, there is the question of what constitutes service. You list the following possible duties in your letters of August 17 and August 26, 1988:

- protecting the train against vandalism
- observing passing trains for any defects or unsafe condition
- flagging
- shutting down locomotives or checking fluid levels
- communicating train consist information via radio
- being "responsible for handling any issue which might arise while the train is not moving"
- doing paperwork
- monitoring engine radios

The first five of these items clearly constitute duty if required or permitted by the railroad, but the last three beg the question of whether they actually and under all circumstances constitute duty. First, "being responsible for handling any issue which might arise" is vague. If the railroad had issued an order to that effect, that fact would probably be inconsistent with a conclusion that the railroad intended that the employee be relieved of all duties. If, however, the railroad had clearly relieved the employee but noted that he or she may be put back on duty should the need arise while awaiting the deadhead transportation, the employee would not be on duty again unless subsequently told to handle an issue that had arisen.

Second, "doing paperwork" when required or permitted to do so by the railroad is time on duty in commingled service. However, merely signing time returns, which ordinarily takes no more than a minute and occurs when

the crew has reached its lodging and is about to begin its rest, is so minimal that it should not be considered as time spent doing paperwork.

Third, "monitoring engine radios" when required or permitted by the railroad to do so is time on duty for an employee given that responsibility, but does not include use of the radio initiated by the train crew to attend to such incidental matters as calling a van driver to give the train's location or ascertain how long a wait the crew will have before being picked up. Nor would an employee who chose to listen to radio transmissions after having been relieved of any responsibility to do so be considered as on duty.

I might also note that, in addition to having to determine whether an activity constituted service and was required or permitted by the railroad, FRA must also weigh the likely compliance impact and litigation risks in deciding whether to assess penalties.

You point out that there have been unspecified situations in which time spent awaiting deadhead transportation has been counted toward the required off-duty period. Time off duty begins at the point of final release, not while the employees are sitting on their train. FRA has permitted one very limited exception as a practical matter: if the time between being relieved of duty and arriving at an away-from-home lodging is 30 minutes or less, such a period can be included in time off duty. Our rationale is that, just as time off duty at a home terminal includes commuting time, so time off duty at an away-from-home terminal may include a reasonable allowance (30 minutes) for commuting. However, if the crew is not at the lodging within 30 minutes of being relieved from duty, the allowance is lost and the whole period (awaiting deadhead and being deadheaded) is limbo time. This policy gives the railroads the incentive to get the employees off the train and to the lodging quickly, which seems to be a purpose you share.

You also claim that crews have been required to stay on their trains as long as 9 hours awaiting transportation. As long as no duties are performed and the full off-duty period is given once the crew arrives at the lodging, these situations are not violations of the Act. Nevertheless, except in the most extreme emergency, such situations are outrageous. I can only point out that, if FRA had substantive regulatory authority in the hours of service area, a regulation could be written to address that issue. For example, a rational rule might extend the required off-duty period by an hour for any hour spent awaiting transportation. Such a rule would discourage the practice that concerns you and possibly increase safety. However, the rigidity of the Act precludes our even considering such a rule.

Very truly yours,

/s/ Gregory B. McBride
GREGORY B. MCBRIDE
Assistant Chief Counsel
for Safety

[October 28, 1992, letter to Robert W. Blanchette from S. Mark Lindsey]

U.S. Department
of Transportation

Federal Railroad
Administration

[Oct. 28, 1992]

Robert W. Blanchette
Vice President-Law and General Counsel
Association of American Railroads
American Railroads Building
50 F St., N.W.
Washington, D.C. 20001

Dear Mr. Blanchette:

On September 22, 1992, the United States Court of Appeals for the Ninth Circuit issued a decision in the related cases of *United Transp. Union v. Skinner* (No. 90-16741) ("*UTU*") and *Bhd. of Locomotive Engineers v. Skinner* (Nos. 91-35911, 91-36061) ("*BLE*"). A copy of the decision is enclosed. Those cases concern FRA's interpretation of the Hours of Service Act as it pertains to the status of train crew members waiting for deadhead transportation to their point of final release.

The Court of Appeals upheld the decision of the district court in Portland in *BLE*, which found that all time spent waiting for transportation is to be considered on-duty time. In the *UTU* case, which was an appeal from the district court in San Francisco, the Court of Appeals affirmed the district court's order of dismissal as to the claims for injunctive relief and mandamus, but reversed the district court's dismissal of the entire case and remanded the case to that court for further proceedings con-

sistent with the appellate court's opinion on the interpretive issue.

FRA has traditionally considered an employee on duty during the time spent awaiting arrival of the deadhead vehicle only if the employee actually has duties to perform. If the railroad had relieved the employee of all responsibility, we have considered the time spent merely waiting for the deadhead vehicle to arrive as "limbo time" (*i.e.*, neither on nor off duty) for hours of service purposes.

Although we do not agree with the court's rationale, we have decided to accept its decision and treat it as binding. Given the ambiguity of the Act's pertinent provisions, the issue has always been a close one. While we do not agree that the conclusion reached by the court is compelled by previous case law, we believe the court's reading of the statute, like the interpretation FRA has held until now, to be reasonable.

Moreover, our traditional interpretation was based on the assumption that some railroads might choose to continue crews in train operation if having the crews tie up the train and await deadhead transportation would itself constitute a violation. We did not wish to encourage the less safe alternative of having the crews continue train operation after expiration of their legally permissible hours. However, we have not seen evidence of such behavior in Oregon, where the interpretation of the district court has been in effect for more than a year. Moreover, with increased Hours of Service Act penalties and individual liability now a reality, we are more convinced that railroads will work to avoid violations and, if faced with an inevitable violation, choose the safer alternative. Although awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly, FRA will treat more harshly the violations that are more likely to have a serious impact on safety, *i.e.*, those

violations involving actual train operation after the period permitted by the Act. In addition to the legal incentives to encourage compliance, it appears that railroads have an economic incentive to minimize time spent awaiting deadhead transportation, which is wholly unproductive time.

As our original interpretation made clear, we have long been concerned about the instances in which employees are held on trains for several hours awaiting deadhead transportation even in the absence of any valid emergency that might explain such an occurrence. To the extent the waiting periods are extremely lengthy, there is a chance that they could contribute to the cumulative exhaustion of the employee, despite the fact that the legally required rest period is provided upon arrival at the point of final release. Thus, to the extent that application of the Ninth Circuit's decision reduces the frequency of such instances, it may actually contribute to safety.

Accordingly, in the interest of uniform application of the Hours of Service Act, we will treat the Ninth Circuit's opinion as binding in the entire nation. We will do so in two stages. We will consider the court's reading of the Act binding within the Ninth Circuit beginning at 12:01 a.m. on November 1, 1992. The Ninth Circuit, of course, includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. We have chosen November 1 because that date will likely precede or be very close to the issuance of the mandate by the Court of Appeals and railroads within that circuit have had every reason to expect that its mandate would be honored.

This means that, *starting on November 1*, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall, *if it occurs within the territory of the Ninth Circuit*, be treated as time on duty, and such time should be recorded as such and reports of excess service filed, as necessary, under 49 CFR

Part 228. Should violations occur and come to FRA's knowledge, FRA will, of course, continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties. Although we plan to mail copies of this letter to affected railroads that operate within the Ninth Circuit, we would appreciate your cooperation in making known our intention to enforce the court's decision to your member railroads.

For the remainder of the nation, we believe that a period of adjustment is necessary in order to permit railroads to train their employees who will be responsible for implementation of the decision. Railroads with operations outside the Ninth Circuit have not had reason, until now, to believe those operations would be affected by the court's decision. We believe a period of 60 days should permit the necessary training to occur. Accordingly, we will begin to apply the Ninth Circuit's decision to operations outside that circuit at 12:01 a.m. on January 1, 1993.

We believe that the longstanding controversy surrounding this single issue of how to treat time spent awaiting deadhead transportation is illustrative of problems inherent in the Hours of Service Act itself. We remain hopeful that railroad management and railroad labor organizations will join FRA and the National Transportation Safety Board in recommending changes in the Act that would permit FRA to issue hours of service regulations reflective of current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive performance.

Sincerely,

/s/ S. Mark Lindsey
S. MARK LINDSEY
Chief Counsel

cc: Lawrence M. Mann, Esq.
Thomas C. Dorsey, Esq.
American Short Line Railroad Assn.

All railroads with operations in the Ninth Circuit

MEMORANDUM

U.S. Department
of Transportation

Federal Railroad
Administration

Date: Dec. 2, 1992 Reply to Attn of OP 92-05

Subject: Hypothetical Examples for the "On-Duty Time" decision of the United States Court of Appeals for the Ninth Circuit

/s/ Edward R. English
From: EDWARD R. ENGLISH
Director, Office of Safety Enforcement

To: Regional Directors

Reference OP Bulletin 92-04 relative to the recent decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner* (No. 90-16741) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos 91-35911, 91-36061) concerning time spent waiting for deadhead transportation to the point of final release after the expiration of the mandatory limits imposed by the Hours of Service Act (Act). In its decision, the court held that all time waiting for transportation was covered service. The attached examples are provided as guidance in determining "on-duty time" as a result of train and engine crews waiting for transportation to their point of final release.

GENERAL STATEMENT

COVERED TIME: WAITING FOR TRANSPORTATION

Crew member(s) reach their statutory limits (expire) under the Act at an outlying point and remain

on or near the train until transportation arrives to carry them to their point of final release. *ONLY* the waiting time is covered service. Waiting time ends when the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to their point of final release arrives.

HYPOTHETICAL EXAMPLES OF "ON-DUTY" TIME COVERED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECISION

The following are examples of time that will be counted as covered service when the decision is applied in your region of the United States.

Example A:

Brazos and Santo Southern (BSS) Train XYZ is called for 2:30 a.m. at Fort Worth for a run to Ranger. The crew expires under the Hours of Service Law at Santo at 2:30 p.m. and remains on the train. Transportation (either contract van, taxi or company auto) arrives at Santo at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. (actual waiting time)

Limbo Time: 3:55 to 5:15 p.m. (travel and tie-up)

Example B:

Same scenario as Example A except at 2:25 p.m. the BSS Dispatcher instructs the crew to relieve themselves prior to the expiration of their hours of service (2:30 p.m.), vacate the train, walk up town to Miss Maude's Cafe where transportation will pick them up for their deadhead to Ranger. Transporta-

tion arrives at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The fact that the crew is not physically present on the train is not the determining factor. Waiting time is the determinate. The crew had to wait until 3:55 p.m. to be picked up by their transportation.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example C:

Same scenario as Example A except a relief crew is deadheaded on following train DEF. Train DEF arrives at Santo at 3:50 p.m. with the relief crew. The relief crew assumed operation of Train XYZ at 3:55 p.m. Train DEF departs Santo at 4:00 p.m. with the expired crew and arrives Ranger at 5:05 p.m. Expired crew ties-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew remained "the crew of the train" until they were relieved by the deadhead relief crew.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example D:

Same scenario as Example C except the expired crew remained on Train XYZ for their deadhead trip to Ranger. Train XYZ departed Santo at 4:30 p.m. *behind* Train DEF. Train XYZ arrived at Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. Expired crew was relieved at 3:55 p.m. They are no longer "the crew of the train." They are considered as being

in their mode of transportation at that time, provided they are deadheading on Train XYZ.

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example E:

Same scenario as Example A except a lite engine consist (or Train DEF) arrives at Santo at 3:50 p.m. Lite engine consist (or Train DEF) couples into (or picks-up) Train XYZ at 3:55 p.m. for the purpose of towing Train XYZ to Ranger. Combined Train departs Santo at 4:30 p.m. and arrives Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew is relieved at 3:55 p.m. when they no longer are "the crew of the train."

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example F:

Same scenario as Example A except the BSS Dispatcher has decided to tie-up the crew at Santo. The BSS Dispatcher has called a local Santo taxi to meet the train. The crew is off Train XYZ and into the taxi at 2:30 p.m., The taxi arrives at Santo Sleepeze Motel at 2:45 p.m. The crew makes a brief mark-off call to the BSS Crew Dispatcher at 2:55 p.m. and ties-up for ten (10) hours rest. The crew is called on their rest for a return deadhead to Fort Worth at 12:55 a.m.

Violation: Predicated on whether or not Santo is a "designated terminal." The crew ceased to be the crew of the train when they were removed for purposes of tieing up for rest. If Santo is not a "desig-

nated terminal", the crew would be on continuous duty until they arrived back at Fort Worth. If Santo is a "designated terminal", a violation would not have occurred since the crew ceased to be "the crew of the train" at 2:30 p.m.

Limbo Time: 2:30 p.m. to 2:55 p.m. (travel and tie-up)

Example G:

BSS Train XYZ arrives at the entry switch to the east end of Ranger Yard at 2:30 p.m. The Ranger Yardmaster instructs the crew to leave the train and wait on an adjacent service road for transportation (contract van, taxi, or company auto). A waiting yard job couples into Trail XYZ, yards the train and takes XYZ's units to the locomotive facility. Crew transportation is delayed. It arrives at the east end of Ranger Yard at 3:05 p.m. The crew arrives at the tie-up point at 3:35 and ties-up at 3:40 p.m.

Violation: 2:30 p.m. to 3:05 p.m. (actual waiting time)

Limbo Time: 3:05 to 3:40 p.m. (travel and tie-up)

Example H:

Same scenario as Example G except the Ranger Yardmaster instructs the crew to remain on the train for transportation because other sources of transportation are not available. The yard job couples into Train XYZ at 2:30 p.m. The train is "yarded" at 3:00 p.m. The yard crew removes Train XYZ's locomotive power and delivers it to the locomotive facility at 3:15 p.m. The tie-up point for the crew of Train XYZ is near the locomotive facility. The crew walks to the tie up point and ties up at 3.30 p.m.

Violation: None. The tow-in of Train XYZ became the crews transportation to their point of final release. In addition, when Train XYZ came under tow, the expired crew was no longer the crew of the train. While this event may be construed as a 5 minute violation (2:30 to 2:35 p.m.), the transportation for the crew (yard job) was present at 2:30 p.m. The *de minimis* nature of the event should also be considered in this example.

Limbo Time: 2:30 p.m. to 3:30 p.m. (travel and tie-up)

Example I:

BSS Yard Job OHME-2 is assigned to work 3:30 p.m. to 11:30 p.m. primarily to make interchange to foreign lines in the Ranger area. OHME-2 departs Ranger Yard at 10:00 p.m. with daily interchange for the Denton, Abilene and Northern (DAN). Due to congestion OHME-2 is still in the DAN Yard at 3:30 a.m. A taxi carrying the relief crew arrives at 4:15 a.m. The expired crew departs the DAN Yard in the taxi at 4:20 a.m., arrives Ranger Yard crew room at 5:10 a.m., and ties-up at 5:15 a.m.

Violation: 3:30 a.m. to 4:15 a.m. (actual waiting time)

Limbo Time: 4:15 a.m. to 5:15 a.m. (travel and tie-up)

NOTE: If the OHME-2 crew is scheduled to work the next afternoon and circumstances caused the tie-up time to be 5:31 a.m. or later, the start time of the next afternoon would have to be set back to obey the requirement that the crew have *ten consecutive hours off duty*.

While these examples do not cover all possible hypothetical situations, two events should be considered in determining the existence of a violation relative to the Ninth Circuit's decision.

1. The time transportation *arrived*.
2. The time the expired crew ceased to be *the crew of the train*.

MEMORANDUM

U.S. Department
of Transportation

Federal Railroad
Administration

RECEIVED BY FAX AT CONRAIL SYSTEM OPERATING RULES OFFICE—JANUARY 11, 1993

FRA INTERPRETATIONS OF "CREW AWAITING DEADHEAD TRANSPORTATION" AND VIOLATION OF THE HOURS OF SERVICE ACT

(Based on Ninth Circuit Court Decision)

Reference to the recent decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner* (No. 90-16741) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos. 91-35911, 91-36061) concerning time spent waiting for deadhead transportation to the point of final release after the expiration of the mandatory limits imposed by the Hours of Service Act (Act). In its decision, the court held that all time waiting for transportation was covered service. The attached examples are provided as guidance in determining "on-duty time" as a result of train and engine crews waiting for transportation to their point of final release.

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the waiting time is covered service. Waiting time ends when the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to their point of final release arrives.

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Violation: 2:30 p.m. to 3:55 p.m. (actual waiting time)

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example B:

Same scenario as Example A except at 2:25 p.m. the BSS Dispatcher instructs the crew to relieve themselves prior to the expiration of their hours of service (2:30 p.m.), vacate the train, walk up town to Miss Maude's Cafe where transportation will pick

them up for their deadhead to Ranger. Transportation arrives at 3:55 p.m. The crew is transported to Ranger where they arrive at 5:05 p.m. and tie-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The fact that the crew is not physically present on the train is not the determining factor. Waiting time is the determinate. The crew had to wait until 3:55 p.m. to be picked up by their transportation.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example C:

Same scenario as Example A except a relief crew is deadheaded on following train DEF. Train DEF arrives at Santo at 3:50 p.m. with the relief crew. The relief crew assumed operation of Train XYZ at 3:55 p.m. Train DEF departs Santo at 4:00 p.m. with the expired crew and arrives Ranger at 5:05 p.m. Expired crew ties-up at 5:15 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew remained "the crew of the train" until they were relieved by the deadhead relief crew.

Limbo Time: 3:55 p.m. to 5:15 p.m. (travel and tie-up)

Example D:

Same scenario as Example C except the expired crew remained on Train XYZ for their deadhead trip to Ranger. Train XYZ departed Santo at 4:30 p.m. *behind* Train DEF. Train XYZ arrived at Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. Expired crew was relieved at 3:55 p.m. They are no longer "the crew of the train." They are considered as being

in their mode of transportation at that time, provided they are deadheading on Train XYZ.

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example E:

Same scenario as Example A except a lite engine consist (or train DEF) arrives at Santo at 3:50 p.m. Lite engine consist (or Train DEF) couples into (or picks-up) Train XYZ at 3:55 p.m. for the purpose of towing Train XYZ to Ranger. Combined Train departs Santo at 4:30 p.m. and arrives Ranger at 5:45 p.m. Expired crew ties-up at 5:55 p.m.

Violation: 2:30 p.m. to 3:55 p.m. The expired crew is relieved at 3:55 p.m. when they no longer are "the crew of the train."

Limbo Time: 3:55 p.m. to 5:55 p.m. (travel and tie-up)

Example F:

Same scenario as Example A except the BSS Dispatcher has decided to tie-up the crew at Santo. The BSS Dispatcher has called a local Santo taxi to meet the train. The crew is off Train XYZ and into the taxi at 2:30 p.m. The taxi arrives at Santo Sleepeze Motel at 2:45 p.m. The crew makes a brief mark-off call to the BSS Crew Dispatcher at 2:55 p.m. and ties-up for ten (10) hours rest. The crew is called on their rest for a return deadhead to Fort Worth at 12:55 a.m.

Violation: Predicated on whether or not Santo is a "desigated terminal." The crew ceased to be the crew of the train when they were removed for purposes of tieing up for rest. If Santo is not a "designated terminal", the crew would be on continuous

duty until they arrived back at Fort Worth. If Santo is a "designated terminal", a violation would not have occurred since the crew ceased to be "the crew of the train" at 2:30 p.m.

Limbo Time: 2:30 p.m. to 2:55 p.m. (travel and tie-up)

Example G:

BSS Train XYZ arrives at the entry switch to the east end of Ranger Yard at 2:30 p.m. The Ranger Yardmaster instructs the crew to leave the train and wait on an adjacent service road for transportation (contract van, taxi, or company auto). A waiting yard job couples into Train XYZ, yards the train and takes XYZ's units to the locomotive facility. Crew transportation is delayed. It arrives at the east end of Ranger Yard at 3:05 p.m. The crew arrives at the tie-up point at 3:35 and ties-up at 3:40 p.m.

Violation: 2:30 p.m. to 3:05 p.m. (actual waiting time)

Limbo Time: 3:05 p.m. to 3:40 p.m. (travel and tie-up)

Example H:

Same scenario as Example G except the Ranger Yardmaster instructs the crew to remain on the train for transportation because other sources of transportation are not available. The yard job couples into Train XYZ at 2:35 p.m. The train is "yarded" at 3:00 p.m. The yard crew removes Train XYZ's locomotive power and delivers it to the locomotive facility at 3:15 p.m. The tie-up point for the crew of Train XYZ is near the locomotive facility. The crew walks to the tie up point and ties up at 3:30 p.m.

Violation: None. The tow-in of Train XYZ became the crews transportation to their point of final release. In addition, when Train XYZ came under tow, the expired crew was no longer the crew of the train. While this event may be construed as a 5 minute violation (2:30 to 2:35 p.m.), the transportation for the crew (yard job) was present at 2:30 p.m. The *de minimis* nature of the event should also be considered in this example.

Limbo Time: 2:30 p.m. to 3:30 p.m. (travel and tie-up)

Example I:

BSS Yard Job OHME-2 is assigned to work 3:30 p.m. to 11:30 p.m. primarily to make interchange to foreign lines in the Ranger area. OHME-2 departs Ranger Yard at 10:00 p.m. with daily interchange for the Denton, Abliene and Northern (DAN). Due to the congestion OHME-2 is still in the DAN Yard at 3:30 a.m. A taxi carrying the relief crew arrives at 4:15 a.m. The expired crew departs the DAN Yard in the taxi at 4:20 a.m., arrives Ranger Yard crew room at 5:10 a.m., and ties-up at 5:15 a.m.

Violation: 3:30 a.m. to 4:15 a.m. (actual waiting time)

Limbo Time: 4:16 a.m. to 5:15 a.m. (travel and tie-up)

NOTE: If the OHME-2 crew is scheduled to work the next afternoon and circumstances caused the tie-up time to be 5:31 a.m. or later, the start time of the next afternoon would have to be set back to obey the requirement that the crew have *two consecutive hours off duty.*

While these examples do not cover all possible hypothetical situations, two events shoud be considered in determining the existence of a violation relative to the Ninth Circuit's decision.

1. The time transportation *arrived.*
2. The time the expired crew ceased to be *the crew of the train.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1505

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
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NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FEDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

S. MARK LINDSEY
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

**PETITION FOR REVIEW OF AGENCY ACTION
BY THE FEDERAL RAILROAD ADMINISTRATION**

Pursuant to 28 U.S.C. § 2342(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents'

erroneous interpretation and application of the Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66.[1]

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent Federal Railroad Administration ("FRA") considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

Despite the fact that both the Railroads and FRA disagree with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide on January 1, 1993. FRA's new interpretation was most recently reflected and expanded in agency memoranda furnished to certain railroads. *See* App. A. FRA considers the memoranda as its official agency position. The FRA's new interpretation is contrary to the statutory language and 85-plus year history of the HSA.

FRA's actions in including the time spent waiting by a train crew that has been relieved from further operating duties as on duty time under the HSA and extending its new, erroneous interpretation of the HSA nationwide are arbitrary, capricious, and not in accordance with the law

[1] On September 3, 1992, Congress amended the Federal Railroad Safety Act, 45 U.S.C. § 431(f), to provide that appeals of final agency action under HSA are subject to the Hobbs Act. *See* Pub. L. No. 102-365, § 2, 106 Stat. 972 (Sept. 3, 1992).

and contrary to the HSA. In addition, the HSA's actions violate the Administrative Procedure Act, because the agency engaged in rulemaking without providing the public with notice of the proposed rule and an opportunity for interested parties to comment on the proposed rule.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further operating duties is not on duty time under the HSA. Such an interpretation is required by the statute and the legislative history.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

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/s/ Ronald M. Johnson
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Attorneys for Petitioners

Date: March 2, 1993

[Memorandum Dated January 11, 1993 and
Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF D. C. EUBANK

I, D. C. EUBANK, based on my personal knowledge, do affirm and state as follows:

1. My name is D. C. Eubank. I am Assistant Vice President-Operating Practices for CSX Transportation, Inc. ("CSXT"). I have held this position since September 1, 1991. My duties include responsibility for CSXT's operating rules, engineer training and certification, hazardous materials field response, FRA alcohol and drug testing, and derailment prevention. I am thoroughly familiar with the historical application of the Hours of Service Act by the Federal Railroad Administration ("FRA") or its predecessors, and with the operational problems that are created by the FRA's recent determination that it will consider "waiting time" as on-duty time rather than "limbo time."

2. I began my railroad career as a brakeman with one of CSXT's predecessors, The Chesapeake and Ohio Railway Company ("C&O") in November of 1955. I worked for the C&O in a contract (union-represented) position until October of 1959, when I was drafted into the Army. I returned to work for the C&O as a conductor in January of 1962, and remained in that position until September of 1964, when I was promoted to a non-contract (management) position as transportation technician in Huntington, West Virginia. From that time up to the present I have held a succession of non-contract positions in the operating department of CSXT or one of its predecessors, including the position of assistant trainmaster, terminal trainmaster, terminal manager, division superintendent, director-operations planning, and general superintendent-line operations. Based upon this experience, I am thor-

oughly familiar with CSXT's and its precedessors' practices regarding waiting time and the Hours of Service Act since 1955, as well as with federal regulatory practices regarding this subject.

3. CSXT is one of the major providers of rail transportation services in the eastern United States, providing rail transportation services to 20 states, the District of Columbia, and the Province of Ontario, Canada. CSXT's rail system consists of approximately 18,800 route miles; it averages approximately 1,300 trains, and 15,000 carloads per day.

4. When I began work for the C&O as a brakeman in 1955, the Hours of Service Act allowed, and the C&O did as necessary, work a train crew right up to the 16 hour maximum that was then applicable under the Hours of Service Act. Any time spent by the train crew beyond this 16 hour period waiting for the arrival of transportation, or being transported back to a terminal where the crew's tour of duty would end, was considered off-duty time under the Hours of Service Act.

5. At no time prior to 1969 did any of CSXT's labor organizations or employees ever to my knowledge allege that this practice violated the Hours of Service Act. At no time prior to 1969 did any federal agency or official ever to my knowledge claim or advise the C&O or its affiliated railroads that this practice violated the Hours of Service Act. Federal inspectors during this period regularly visited the railroad's property and were familiar with its operating practices, including the practice of considering "waiting time" for deadhead transportation as off-duty time.

6. There was to my knowledge no change in the practice of the C&O or its affiliated railroads, or in the federal government's enforcement policy, in 1967 or thereafter with respect to waiting time as a result of the decision in *United States v. Pennsylvania Railroad*, 275 F.Supp. 345 (W.D.Pa. 1967).

7. Subsequent to the Hours of Service Act amendments in 1969, CSXT and its predecessor railroads affiliated as part of the Chessie System did not consider waiting time to be time on duty under the Hours of Service Act. The 1969 amendment reclassified deadhead transportation to a duty assignment as on-duty time. It also created a new category, neither on-duty nor off-duty time, for deadhead transportation from a duty assignment to point of final release. This category of time became known as "limbo time." CSXT and its precedessor railroads considered waiting time to be part of this "limbo time."

8. During the administration of the Hours of Service Act ("HSA") between 1969 and 1992, the FRA did not to my knowledge consider waiting time to be on-duty time. To my knowledge, prior to 1992 the FRA took no exception to CSXT's or its predecessors' practice of treating waiting time as part of limbo time.

9. FRA's announced interpretation whereby, effective January 1, 1993, it will now consider waiting time to be on-duty time creates significant operational problems and inefficiencies for CSXT with no attendant safety benefits. Previously, where a train crew would complete 12 hours of service while still in transit, CSXT was required only to identify a point of rest enroute where the crew could tie up the train prior to expiration of its 12 hours. Under the new interpretation, CSXT must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or a relief crew to be notified and to meet the crew at a tie-up point before the 12 hours have expired. This requires the company to reduce the time in which the train crew can actually operate the train below the 12-hours period authorized by statute. In fact, CSXT previously required a train crew enroute to notify the train dispatcher when ten hours of their on-duty time had expired, in order to permit planning in the event the crew would be unable to reach its destination. Effective January 1, 1993 as a result of FRA's new interpretation re-

garding waiting time, this notice period has been advanced to nine hours because trains will now have to be stopped sooner and deadhead transportation or relief crews must be contacted sooner.

10. Unanticipated delays in train operations inevitably result in train crews being unable to reach their destinations within their 12-hour time limit, despite the fact that CSXT's operations are scheduled to permit compliance with the Hours of Service Act. Under the new interpretation, CSTX must estimate to the best of its ability the time it will take to arrange for deadhead transportation or a relief crew to meet the train at a point where it can be stopped. Not only will the train have to be stopped earlier than usual, but the railroad cannot absolutely predict or control the time that deadhead transportation or a relief crew will require to meet the train. Delays can result from a variety of factors, including deadhead transportation or a relief crew not being immediately available, encountering delays or breakdowns enroute, train delays, and communication mix-ups among the numerous parties who must coordinate this operation. Due to these logistical problems, the railroad inevitably will be exposed to fines when the deadhead transportation or relief crew does not arrive in time, despite the best efforts of all concerned.

11. The fines the railroad will be subjected to, and the reduction in crew productivity that will occur as the railroad attempts to comply with FRA's new interpretation, does not advance the underlying safety goals of the HSA. Once a train is stopped at the 12-hour limit, its crew is relieved of all train-handling responsibility. Accordingly, there is no safety risk to either the public or the train crew associated with the historical practice of considering this waiting time as off-duty time or, subsequently, as limbo time. Indeed, once the train crew is relieved from duty, neither CSXT nor its predecessors even required the crew to remain on the train. The crew is and has always been free to await deadhead transportation in a restaurant or other facility if available, or to make its own way to the point of final release rather than await deadhead transportation provided by the company. Furthermore, CSTX train crews normally do not have to await deadhead transportation for an extended period of time beyond their 12-hour limit.

Further affiant sayeth naught.

/s/ D. C. Eubank
D. C. EUBANK

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ARTHUR HENSON

STATE OF COLORADO)
CITY AND) ss.
COUNTY OF DENVER)

I, Arthur Henson, being first duly sworn, depose and say as follows:

1. I was first employed by a corporate predecessor of Southern Pacific Transportation Company ("SPT") as a telegraph operator in 1946. In 1950 I was promoted to Train Dispatcher and held that position until 1959 when I was appointed to the position of Assistant Train Master. From 1959 until 1975 I held various officer positions in the Transportation Department of SPT. In 1975 I was appointed Senior Chief Dispatcher at Houston.

2. From 1977 through the present I have held the following positions: Manager of the Power Bureau, Assistant to the General Manager, Assistant Superintendent, Superintendent, Assistant General Manager, General Manager and Vice President-Transportation.

3. During my entire career as an officer of SPT I have been responsible for seeing that SPT complies with the Hours of Service Act within the geographical territory under my jurisdiction in the particular job that I held. I am thoroughly familiar with the practices and policies of SPT with respect to the Hours of Service Act.

4. When I became a dispatcher in 1950 it was the railroad's practice not to count the time spent by train crews waiting to be picked up for rest as "on duty" time

under the Hours of Service Act. Once a train crew had been instructed to stop their train and await transportation to their off duty point they were considered to be no longer on duty. They were considered to be "off duty".

5. After the 1969 amendments to the Hours of Service Act the Federal Railroad Administration took the position that such waiting time was neither "on duty" or "off duty" time but would be considered as "limbo" time. That became the position of SPT at that time.

6. From 1950 until the Ninth Circuit Decision in *United Transportation Union v. Skinner*, 1992 U.S. App. Lexis 22851 (9th Cir. September 22, 1992), it was SPT's practice not to count such waiting time as on duty time. Such waiting time was never reported as "on duty" time under the Hours of Service Act. At no time did any representative of the Federal Railroad Administration or its predecessor advise SPT that such waiting time should be considered as "on duty" time under the Hours of Service Act.

/s/ Arthur Henson
ARTHUR HENSON

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ALLAN C. FISHER

I, ALLAN C. FISHER, based on my personal knowledge, do affirm and state as follows:

1. My name is Allan C. Fisher and I have been Conrail's Director of Operating Rule since 1983. In my position I am responsible for the maintenance and instruction of Operating Rules throughout Conrail and establishment and monitoring of safe operating practices. I also have the responsibility for ensuring that Conrail is in compliance with Federal Rules and Regulations affecting all operating employees on Conrail.

2. Previously I have been a field operations officer for Conrail and its predecessor railroads beginning in 1970 and worked various locations as direct supervisor of Operating Department employees, including train and engine employees, ensuring safe and efficient operation of Conrail's trains. (See my resume attached as Exhibit "A").

3. In my entire career since early 1970 in the Penn Central and Conrail Operating Departments, time spent by crews awaiting deadhead transportation has never been considered as on duty time under the Hours of Service Act. This time was considered "limbo" time and our crews were paid consumed time until they reached their final off duty point and left the property to start their rest period under the Hours of Service.

4. During the last week of December, 1992 I issued a Standard Division Notice, which is a Special Instruction to all affected employees, explaining the FRA's new interpretation of the Hours of Service Act regarding crews awaiting deadhead transportation. It also explained how our train and engine crews should properly report

any apparent violation of the Hours of Service Act due to the new interpretaiton. (Exhibit "B").

5. Conrail continues to see that all employees understand that there are no violations of the Hours of Service Act caused by the movement of a Conrail train. The new interpretation of the Hours of Service Act requiring time spent by crews awaiting deadhead transportation to be reported as a violation of the Hours of Service has caused us to reevaluate the schedules for our crews over the road transportation plan and also our crew road transportation arrangements.

6. Even with instructions mandating strict compliance with the Federal Hours of Service Act for train operations, it is impossible to predict when a train will experience mechanical difficulties which will cause an unexpected delay to the train and a resultant expiration of the crew's time allowed under the Hours of Service Act at points where transportation is not readily available to be dispatched. Conrail is closely monitoring January and February 1992 operations to determine the extent of the problem. We may have to stop trains which ordinarily would have enough time to make their destination at a location short of the final destination to allow for potential equipment failures and crew road transportation unavailability. The cost in delays to customer traffic cannot be quantitatively assessed. However, I do know that when the railroad consistently fails to meet customer expectations their business is lost to the railroad forever.

7. Many of our intermodal and miscellaneous freight trains now traverse our system and arrive at customer sidings with one or two days less transit time than 10 years ago. All of this has been possible due to the tremendous reinvestment the railroads have made in their rights-of-way and equipment since deregulation. This investment has reduced the unproductive time spent by our crews on the railroad and have allowed for a much safer railroad. The reduction in Conrail train accidents

and personal injuries in the last 10 year period certainly reflects these improving trends.

8. These gains in productivity and changes at achieving a greater percentage of freight traffic then has been handled in the past could be jeopardized by a deterioration in service if the Federal Railroad Administration continues to maintain and enforce its new interpretation. Crews awaiting deadhead transportation are not working —they perform no railroad service. Thus, the safety purposes underlying the Hours of Service Act are not implicated. Furthermore, it has always been in the railroad's best interest to see that crews arrive at their off duty point and receive full rest as quickly as possible so that the railroad does not have to incur additional and unnecessary transportation costs.

/s/ Allan C. Fisher
ALLAN C. FISHER

[Notarization Omitted in Printing]

EXHIBIT A

ADDRESS

215 Poplar Avenue, Wayne, PA 19087 Telephone: (215) 687-5962

EDUCATION

Northwestern University, M.S. in Transportation, June 1970.

Transportation Center Fellowship, winter and spring quarters, 1968-69.

Urban Transportation Fellowship, fall quarter, 1969.

St. Lawrence University, B.A. in Economics, June 1965.

Dean's Award for Academic Improvement, 1964-65.

Officer of Sigma Chi, International Relations Club and two choral groups.

WORK EXPERIENCE

November 1983-Present: Director Operating Rules, System Office, Philadelphia, PA, Consolidated Rail Corpotion.

March 1982-November 1983: Regional Superintendent, Industrial Engineering Southern Region, Indianapolis, Indiana, Consolidated Rail Corporation.

March 1980-March 1982: Director Budget Controls, Finance Department, System Office, Philadelphila, PA, Consolidated Rail Corporation.

August 1978-March 1980: Regional Superintendent, Operations Improvement, Central Region.

January 1978-August 1978: Division Superintendent, Lehigh Division.

February 1977-January 1978: Division Superintendent, New Jersey Division.

February 1976-February 1977: Terminal Superintendent, Conway Yard.

November 1975-February 1976: Assistant Division Superintendent, Chesapeake Division, Penn Central.

October 1974-November 1975: Terminal Superintendent, Baltimore, Maryland.

July 1974-October 1974: Assistant Terminal Superintendent, Cleveland, Ohio.

August 1973-July 1974: Trainmaster, Penn Central Collinwood Yard, Cleveland, Ohio.

December 1972-August 1973: Terminal Trainmaster, Penn Central Robert R. Young Yard, Elkhart, Indiana.

October 1971-December 1972: Trainmaster, Penn Central Airline Junction Yard, Toledo, Ohio.

September 1970-October 1971: Night Assistant Trainmaster, Penn Central Englewood and 55th Street Yards, Chicago, Illinois.

January 1970-September 1970: Operating Management Trainee for Penn Central Company.

June 1969-October 1969: Research Economist for Transportation Research Department of General Motors Research Laboratories, Warren, Michigan.

MILITARY EXPERIENCE

January 1966-December 1967: U.S. Army Transportation Corps Officer. Received Bronze Star for meritorious service in Vietnam.

EXHIBIT B

CONRAIL® MEMORANDUM

DATE: December 16, 1992

TO: Transportation Superintendents

/s/ A. C. Fisher
FROM: A. C. FISHER Location: C 14-C

SUBJECT: Division Notice
Federal Hours of Service Act

The following Division Notice should be issued to be effective January 1, 1993.

(Q-) TO ALL TRAIN AND ENGINE SERVICE EMPLOYEES FEDERAL HOURS OF SERVICE ACT

The Federal Railroad Administration has accepted the Ninth Circuit Court's decision that time spent awaiting deadhead transportation is on-duty time under the Hours of Service Act.

Therefore, effective January 1, 1993 all Train and Engine service employees must properly report the details of all violations of the Hours of Service Act. This will be done on Train and Engine combined Yard or Road timeslip in the "Remarks" section as follows:

Example 1.

Hours of Service Violation

Train Movement to (specify location) until (specify time) ordered by Train Disptacher (specify name).

Example 2.

Hours of Service Violation

Waiting for deadhead transportation only at (specify location) until (specify time).

Example 3.

Hours of Service Violation

Train Movement to (specify location) until (specify time) ordered by Train Dispatcher (specify name) and waiting for deadhead transportation until (specify time).

These records are necessary to permit Conrail to make required reports of all violations to the FRA. Waiting for deadhead transportation time starts when train makes final stop and ends when deadhead transportation starts movement from location of outlawed train to final terminal for the crew.

All reports of violations are subject to comparison with crew transportation records which will indicate when vehicle arrived at outlawed train and the departure time from outlawed train location.

It is Conrail's policy to fully comply with the Federal Hours of Service Act. Violations of the Federal Hours of Service Act involving train movement are permitted only in extreme emergencies. Questions on this notice should be addressed to Division Manager of Operating Rules at telephone extension ————.

Distribution:

G. R. Comstock
R. R. Downing
D. R. Greer
R. E. Huffman
E. G. Motte
M. M. Owens

cc:

R. S. Pyson
G. N. Corcoran
R. E. Hatton
J. R. Beard
T. P. Dwyer
J. W. Fallon
R. E. Gratz
R. L. Hoover
G. M. Spiegel
J. H. Reid
A. D. Burnett
K. M. Dailey
A. F. Dowd
P. D. Harris
J. L. Kivowitz
R. D. Shilling
M. Hilleary

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF WAYNE A. HATTON

I, WAYNE A. HATTON, based on my personal knowledge, do affirm and state as follows:

1. My name is Wayne A. Hatton. I am Vice President Transportation of Burlington Northern Railroad Company ("BN"), a position I have held since December 1989. My principal responsibilities involve planning, direction and control of system-wide transportation functions related to train and terminal operations, service design, and performance. Performance functions include allocation of freight equipment and locomotives across the BN system so as to maximize customer service levels at commensurate cost to the company.

2. I began my career with a predecssor of BN, the Chicago, Burlington & Quincy Railroad, as an Assistant Trainmaster in June 1966, nearly twenty-seven years ago. Prior to joining the former "Q," I worked for three years, from 1963-66 for the Elgin, Joliet & Eastern Railroad as an Assistant Trainmaster and a Financial Analyst. In September 1970, after the merger earlier that year of four BN-predecessor railroads including the "Q" to create the Burlington Northern, I became a Trainmaster for BN in Aurora, Illinois. For the next ten years, I progressed through various operating positions of increasing responsibility with BN, including various terminal management and equipment management positions, culminating in my promotion to Assistant Vice President Operations in May 1980. I assumed the position of Vice President and General Manager shortly thereafter in February 1981. From that time until I assumed my present position in December, 1989, I held a variety of Vice President positions across the BN system, including Vice President of Operations Services, and Vice President of Service Design.

3. Throughout my career at BN, I have accumulated a great deal of experience in nearly all facets of railroad operations and transportation, both at the terminal and system-wide levels. I have extensive experience with operations and transportation planning, including crew management functions. Based on this experience, I am thoroughly familiar with the requirements of the federal Hours of Service Act, and with BN's and its predecessors' practices with respect to that Act. I am also familiar with the historical interpretation, application, and enforcement of the Hours of Service Act by the Federal Railroad Administration ("FRA"). I have knowledge of the decision issued late in 1992 by the U.S. Court of Appeals for the Ninth Circuit in the *UTU v. Skinner* case, with respect to the application of the Hours of Service Act to "waiting time" or so-called "limbo-time." I am also familiar with the FRA's announced interpretation of that court decision, whereby effective January 1, 1993, that agency will consider such waiting time to be on-duty time under the Hours of Service Act throughout the United States. I have personal knowledge of the implications and impact of that decision on Burlington Northern.

4. BN is the longest railroad in North America, operating approximately 25,000 miles of track across 25 states and in two Canadian provinces. On average, BN operates in excess of 750 trains and handles nearly 12,000 carloads per day. To conduct these operations, BN employs between 2,100 and 2,200 crew starts on an average day.

5. Based upon my extensive experience in operations and transportation on BN and its predecessors, I can say that neither before the effectiveness of the 1969 Hours of Service Act ("HOSA") amendments in December 1970 nor after, was time waiting for deadhead transpor-

tation to the point of final release to be on duty time under the Act. Those amendments to the HOSA changed the legal requirements and practices in the industry with respect to the treatment of time spent deadheading to begin a tour of duty, and with respect to the treatment of deadhead transportation to the point of final release after a tour of duty.

6. In my experience, however, prior to the recent decisions of the Ninth Circuit and the FRA's related new policy, throughout my career at BN, the time a crew spends simply waiting for deadhead transportation to their release point after being relieved from duty has never been considered time on duty. Prior to the 1969 amendments to the HOSA, such waiting time was considered off duty time. After the 1969 amendment, these waiting periods have been regarded as "limbo" time, *i.e.*, neither time on duty nor as rest time off duty. Our policies and practices on BN with respect to the treatment of this time as off duty time and then as limbo time have been continuous and consistent throughout by career at BN, right up until January 1 of this year when the FRA acquiesced in the Ninth Circuit Court's decision. To my knowledge, the FRA has never considered our practices as inconsistent with or violative of the Hours of Service Act. I do not recall an instance where an FRA investigator identified our practices in this regard as a problem under the Hours of Service Act or cited BN for the practice.

7. In my opinion, based on years of practical experience with the requirements of the Hours of Service Act, the policy of treating this waiting time as either off-duty time or limbo time has a solid basis. Once an employee is relieved from duty, whether or not he has reached his maximum hours of duty under the HOSA, and whether or not he is at a point of final release at the time, that employee no longer has any duties to perform in connection with the movement of a train or otherwise. There being no further duties to perform, we have always

viewed this situation as one in which the work, fatigue, and safety objectives of the HOSA do not apply. To my knowledge, FRA adopted this understanding in its enforcement of the Hours of Service Act historically, and until the Ninth Circuit's decision late in 1992, did not take issue with this position. Indeed, the position represented by the FRA's new January 1, 1993 policy appears to be inconsistent with the whole concept of "covered service" and the additional obligations and safety concerns that attach when a certain type of work is "covered service." Where an employee has no additional duties to perform and is simply waiting for deadhead transportation, he cannot reasonably be regarded as performing "covered service."

8. In my experience, it has always been the practice of BN and its predecessors to make every effort to get deadhead transportation to employees relieved of duty as promptly as possible. As in nearly every aspect of railroad operations, occassionally there may be an exceptional situation. But in the vast majority of circumstances, BN utilizes every available resource to see to it that deadhead transportation gets to the employees quickly, and to see to it that the time spent waiting for that transportation is avoided or kept to an absolute minimum. This practice is not only better and more humane for our employees, but it minimizes the time lost before the employees have their necessary rest and can return to duty should they be needed. On occasion, we have taken extraordinary measures to minimize this waiting time, such as stopping an opposing train to pick up a crew in this situation and take them to the next appropriate town. On other occasions, we have put employees in buses or other forms of public transportation where appropriate, and have directed managers and officers of the company to personally provide the deadhead transportation for the crews so as to keep that waiting time to an absolute minimum. In winter weather situations, we have dispatched special snow plow or end-loader

equipment to minimize the waiting time. It is simply an inaccurate statement of historical practice to suggest that BN is unconcerned with the duration of "limbo time."

9. If the FRA's announced new policy regarding the treatment of these waiting time periods under the Hours of Service Act continues, there is no question in my mind that it will have a very substantial adverse effect on productivity at Burlington Northern. As a practical matter, it will shorten available work time under the HOSA, and will require the company to relieve crews from duty well prior to their maximum hours of work, contrary to the HOSA. In my opinion, this result will serve no objective of the Hours of Service Act, nor any legitimate safety goal. It will simply result in greater expense to the railroads for the same work.

Further Affiant sayeth not.

/s/ Wayne A. Hatton
WAYNE A. HATTON

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF ROBERT C. EWERS

I, ROBERT C. EWERS, do affirm and state the following:

1. My name is Robert C. Ewers and I have been employed by Norfolk Southern Corporation ("Norfolk Southern") as Manager Operating Rules since February 1, 1984. Norfolk Southern controls, by common stock ownership, Norfolk Southern Railway Company, which in turn owns 100% of the stock of the Norfolk and Western Railway Company. Prior to 1984, I was employed by Norfolk Southern, and before that (since 1965) by Norfolk and Western Railway Company, in the following positions in the order shown: Special Officer (Police Department), Management Trainee, Assistant Trainmaster, Trainmaster, and Assistant Manager Operating Rules.

2. My duties include responsibility for Norfolk Southern's Operating Rules, Safety and General Conduct Rules, Rules for Equipment Operation and Handling (Form NS-1), efficiency test program, annual rules examinations for certain salaried and scheduled employees in the Operations Division, and in general, all operating directives pertinent to safety of operations. Further, I am responsible for ensuring compliance with various federal regulations governing operation of the railroad, including recordkeeping and reporting requirements. I am currently Norfolk Southern's reporting officer for incidents of noncompliance with the Hours of Service Act, a responsibility I have been charged with since 1987 for both Norfolk Southern Railway Company and Norfolk and Western Railway Company. From 1984 until 1987, I was charged with the same responsibility for Norfolk and Western alone.

3. I have been a member of the Association of American Railroads Operating Rules Committee since 1984, and I served as Vice Chairman in 1989 and 1990 and as Chairman in 1991 and 1992. In addition, I am currently Chairman of Norfolk Southern Railway's System Safety and Operating Rules and Procedures Committee.

4. I had considerable experience in dealing with the Hours of Service Act as a Transportation Department field officer from 1968 until 1975. Since that time, my involvement has been substantially more extensive, including interpretation of all provisions of that Act and verifying the technical correctness of monthly reports of incidents of noncompliance before they are submitted to the Federal Railroad Administration. Also, as I said in paragraph 2 above, I have been reporting officer for incidents of excess service since 1984.

5. Prior to 1969 when a train crew was relieved of operating responsibilities, time spent awaiting deadhead transportation and time spent in deadhead service to the point of final release was considered to be time off duty. Subsequent to the 1969 amendments to the Hours of Service Act, and before January 1, 1993, this was considered as "limbo" time, *i.e.*, neither time on duty nor rest time for purposes of the Act. These applications of the Act have always been deemed as in compliance with the language and intent of the Act and pertinent regulations by both the railroad industry and the Federal Railroad Administration (including FRA's predecessor in enforcing federal rail safety laws, the Interstate Commerce Commission).

6. Pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992), and the Federal Railroad Administration's subsequent reinterpretation of the Hours of Service Act, which relies on the *Skinner* case, Norfolk Southern issued an operating directive effective January 1, 1993, to the effect that

time spent awaiting deadhead transportation by train and engine service crews after they were relieved of operating responsibities will be treated as time on duty.

7. In regard to the foregoing, it is my observation and opinion that the Norfolk Southern carriers and other railroads will, in many cases, suffer excessive delay to freight shipments and incur substantial expense because they will have to stop trains short of destination to avoid being found in noncompliance with the Act under the FRA's recent reinterpretation of it. For erample, when a crew is running tight on time, but still appears to be able to reach final destination before expiration of the 12-hour limit, any unanticipated delay such as a burst air hose or stopping in the interest of safety for a hot journal or other possible safety defect would be likely to result in a "violation" under the FRA's reinterpretation. It simply is not feasible under such circumstances to have transportation waiting for crews at or near all points where unanticipated stops might occur. The recent "snow hurricane" presented examples of where train runs were cancelled or shortened in order to minimize potential exposure to liability for violations of the Hours of Service Act under the FRA's reinterpretation.

/s/ Robert C. Ewers
(signed)

March 19, 1993
(date)

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

AFFIDAVIT OF J. E. SANFORD

I, J. E. Sanford, based on my personal knowledge do affirm and state as follows:

1. My name is J. E. Sanford. I am General Director of Operating Practices for Union Pacific Railroad (UPRR). I have held this position since January 1, 1993. My duties include responsibility for UPRR operating rules, engineer training and certification, FRA Hours of Service reporting, FRA settlement conferences, railroad efficiency testing, and derailment prevention.

2. I began my railroad career as a brakeman September 6, 1955, with the UPRR on the Fifth District at Cheyenne, Wyoming. I worked for the UPRR in an agreement (union—represented) position until September 1969, when I was promoted to a non-agreement (management) position as Assistant Superintendent—Safety and Courtesy for the Wyoming Division headquartered at Cheyenne, Wyoming. Since that time, I have held a succession of non-agreement positions in the Operating Department of UPRR including the position of Trainmaster, Assistant Division Superintendent, Division Superintendent, and General Superintendent—Field Operations. Based upon this experience, I am thoroughly familiar with UPRR's practices regarding waiting time and the Hours of Service Act since 1955, as well as with federal regulatory practices regarding this subject. I am also aware of the operational problems that are created by FRA's recent determination that it will consider "waiting time" as on-duty time rather than "limbo time."

3. UPRR is one of the major providers of rail transportation services in the western half of the United States, providing rail transportation service to 18 states and interchanging with Mexico and Canada. UPRR's rail system consists of approximately 20,000 route miles; it averages approximately 1,400 train and 14,000 car loads per day.

4. When I began work for the UPRR as a brakeman in 1955, the Hours of Service Act allowed and, if circumstances dictated, UPRR did work a train crew right up to the 16-hour maximum prescribed under the Hours of Service Act. Any time spent by the train crew beyond this 16-hour period waiting for the arrival of transportation, or being transported back to the terminal where the crews would tie up, was considered off-duty time under the Hours of Service Act.

5. To my knowledge, none of the UPRR labor organizations or employees ever alleged prior to 1969 that the practice of considering the time waiting for transportation as off-duty time violated the Hours of Service Act. Nor, to my knowledge, did any federal agency or official ever claim or advise UPRR prior to 1969 that this practice violated the Hours of Service Act. Several inspectors during this period regularly visited UPRR's property and were familiar with the operating practices, including the practice of considering time waiting for deadhead transportation as off-duty time.

6. The Hours of Service Act was amended in 1969. The 1969 amendments provided for the reclassification of deadhead transportation to a duty assignment as on-duty time. The amendments also created a new category, which was neither on-duty nor off-duty time, for deadhead transportation from the duty assignment to the point of final release. This category of time became known as "limbo time." Subsequent

to the 1969 amendments, UPRR considered time waiting for deadhead transportation to be part of this "limbo time."

7. The FRA did not, to my knowledge, consider waiting time to be on-duty time during the administration of the Hours of Service Act ("HSA") between 1969 and 1991. Prior to 1991, the FRA took no exception to UPRR's practice of treating waiting time as part of "limbo time."

8. FRA's announced interpretation that effective November 1, 1992, for certain states in the jurisdiction of the Ninth Circuit Court, and January 1, 1993, for the rest of the nation, it will consider waiting time to be on-duty time creates significant operational problems and inefficiencies for UPRR with no attendant safety benefits. Previously, in those instances where a train crew would complete 12 hours of service while still in transit, UPRR was required only to identify a point (a track) where the crews could tie up the train prior to expiration of the 12 hours. Under the new interpretation, UPRR must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or relief crews to be notified and to meet the crew at a tie-up point before the 12 hours has expired. This requires UPRR to reduce the time in which the train crew can actually operate the train during the 12-hour period authorized by the statute. In fact, UPRR previously required a train crew to notify the train dispatchers sufficiently in advance of the expiration of their on-duty time so that appropriate arrangements could be made in the event it appeared that the crew would be unable to reach its destination. Effective November 1, 1992, as a result of FRA's new interpretation regarding waiting time, this notice period has become more critical because train crews now have

to be stopped sooner and deadhead transportation or relief crews must be contacted much earlier.

9. Unanticipated delays in train operations inevitably result in train crews being unable to reach a destination within the 12-hour time limit despite the fact that UPRR's operations are scheduled to permit compliance with the Hours of Service Act. Under the new interpretation, UPRR must estimate to the best of its ability the time limit to arrange for deadhead transportation or a relief crew to meet the train at a point where it can be stopped. Not only will the train have to be stopped earlier than usual, but UPRR cannot absolutely predict or control the time that the deadhead transportation or the relief crew will arrive to meet the train. Delays can result from a variety of factors, including deadhead transportation or a relief crew not being immediately available, encountering delays or breakdowns en route, train delays, and communication mix-ups among the numerous parties who must coordinate this operation. Due to these logistical problems, UPRR inevitably will be exposed to fines when the deadhead transportation or the relief crew does not arrive in time, despite the best efforts of all concerned.

10. The fines UPRR will be subjected to, and the reduction in crew productivity that will occur as UPRR attempts to comply with FRA's new interpretation, does not advance the underlying safety goals of the Hours of Service Act. Once a train is stopped at the 12-hour limit, its crew is relieved of all train handling responsibility. Accordingly, there is no safety risk to either the public or the train crew associated with the historical practice of considering this waiting time as off-duty time or, subsequently, as "limbo time." Indeed, once the train crew is relieved from duty, UPRR does not require the train crew

to remain on the train. The crew is, and has always been, free to await deadhead transportation in a restaurant or other facility, if available, or to make its own way to the final point of release rather than await deadhead transportation provided by UPRR. At no time after a crew's hours of service has expired has the crew been held responsible for any operation of the train. Furthermore, UPRR's train crews normally do not have to await deadhead transportation for an extended period of time beyond their 12-hour limit.

Further affiant sayeth not.

/s/ Jack E. Sanford
JACK E. SANFORD

[Notarization Omitted in Printing]

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

PETITION FOR INTERPRETATION OF HOURS OF SERVICE ACT

I. INTRODUCTION

The Atchison, Topeka & Santa Fe Railway ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads"), which together account for more than 90 percent of the nation's rail lines, petition the Federal Railroad Administration ("FRA") for an interpretation of the Hours of Service Act ("HSA").

Specifically, the Railroads request an interpretative ruling that the time spent waiting for deadhead transportation by a train crew, which has been relieved from all train operating duties, is time off duty within the meaning of the HSA. Alternatively, the Railroads ask the FRA to interpret such waiting time as time "in deadhead transportation . . . from duty to . . . point of final release," *i.e.*, as "limbo time." Both interpretations are consistent with and required by the HSA and its history. Indeed, these were the prevailing and accepted interpretations under the HSA until 1992. As Congress intended, these prior interpretations provided a clearly defined safe harbor in which railroads could utilize train crews without fear of violating the HSA. These interpretations also were

easily administered by the railroads and FRA, and fully realized the HSA's safety objectives. Adoption of either interpretation would, of course, require the FRA to rescind its new interpretation of the HSA, under which a train crew is considered on duty until its transportation to point of final release arrives.

Under the new FRA interpretation, which is contained in memoranda provided by FRA to various railroads (*see* Appendix ("App.") A), an outlawed crew is considered to be on duty until "the expired crew ceases to be *THE CREW OF THE TRAIN*, which occurs when the transportation that will carry them back to the point of final release arrives." (emphasis added). This new FRA interpretation is accompanied by a series of "hypothetical examples of 'on duty' time covered by the United States Court of Appeals for the Ninth Circuit decision" in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992) ("*UTU v. Skinner*"). The Railroads respectfully submit that this new, further interpretation is contrary to the HSA, its legislative history, and the settled application of the statute. While the Ninth Circuit's decision is binding on the FRA within that Circuit, this was no reason to compound that court's erroneous interpretation of the HSA extending an even more restrictive, and equally erroneous, interpretation nationwide.

Moreover, FRA's new interpretation of the HSA is, in effect, substantive rulemaking. The FRA, however, has in the past taken the position that it lacks substantive rulemaking authority under the HSA. Even if its new interpretation were characterized as an interpretive rule, the FRA should nonetheless invite public comment on its new interpretation, as well as the Railroads' Petition, because FRA's new interpretation departs from more than 80 years of practice under the HSA and will have substantive legal and practical effects on the railroad industry. In these circumstances, notice and comment rulemaking is a legal requirement even for an interpretive

rule. Even if it were not, sound agency decisionmaking dictates such procedures. In that regard, when FRA issued an interpretive rule under HSA in 1977, it provided the public with notice of the proposed rule and an opportunity to comment prior to issuing its final rule. Significantly, FRA's new interpretation substantially amended this earlier interpretive rule.

Because of the importance of the issue, and the very real possibility that the new interpretation will lead to an avalanche of de minimis violations, the Railroads request that FRA address this Petition as soon as possible and refrain from enforcing its new interpretation until after it acts on this Petition.

In Part II of this Petition, the Railroads lay out the historical treatment of time spent waiting for deadhead transportation under the HSA. This history conclusively shows that, with one exception, until *UTU v. Skinner*, this waiting time was never considered by anyone to be "on duty time." Additionally, it shows that in the 1969 Amendments to the HSA, Congress codified the historical treatment of such time as off duty time. In Part III of the Petition, the Railroads explain the many serious deficiencies in the Ninth Circuit's reasoning, which led it, and now the FRA, to clearly erroneous interpretations of the HSA. In Part IV, the Railroads review the FRA's actions since the Ninth Circuit decision. Finally, in Part V, the Railroads explain that the FRA should follow the Administrative Procedure Act and provide notice and an opportunity to comment before it embarks on a radically new interpretation of "waiting time" under the HSA. If, however, after considering this Petition, the FRA agrees with the Railroads' interpretation of the HSA, there is no need for a rulemaking proceeding, because the FRA will be adhering to the longstanding, congressionally ratified interpretation of the HSA.

II. HISTORICAL TREATMENT OF TIME SPENT WAITING FOR DEADHEAD TRANSPORTATION

A. *Original Enactment Of HSA (1907) Until 1966*

In 1907, the Hours of Service Act ("HSA") was enacted to enhance railroad safety by establishing limits on the number of hours continuously worked by train crews and certain other railroad employees. As originally enacted, the HSA prohibited covered employees from being "on duty" performing services in connection with the movement of a train "for a longer period than sixteen consecutive hours. . . ." 45 U.S.C. § 62. The Act also required that an employee reaching that 16 hour limit receive 8 (or 10 depending on whether the service was consecutive or aggregate) consecutive hours "off duty" or rest time before returning to service. Under the language of the original statute, all time during a 24-hour period was generally characterized as either "on duty" or "off duty" time.

The 1907 Act did not expressly define "on duty," "off duty," or what constituted continuous service. During the early years after the HSA's enactment, there was extensive litigation of what constituted on duty or off duty time for purposes of HSA, and the courts were required to address the issues in various factual contexts. The judiciary and the Interstate Commerce Commission ("ICC"), the federal agency originally responsible for administration of the HSA, developed the HSA's definitions over time as issues relating to the Act's administration arose. For example, early on, issues arose whether an intermittent break in an employee's tour of duty meant that service before and after the break was not continuous for purposes of calculating the 16-hour limit. Courts held that meal periods and other brief or "trifling interruptions," *United States v. Chicago, M. & P. S. Ry.*, 197 F. 624 (E.D. Wash. 1912), did not break continuous service and were to be considered on duty time where the employee had not been relieved from duty, could be re-

called at any moment, and had no opportunity to rest before being recalled. *See, e.g., Missouri, K. & T. R.R. v. United States*, 231 U.S. 112 (1913); *Chicago R.I. & P. R.R. v. United States*, 253 F. 555 (8th Cir. 1918) (meal periods); *United States v. Chicago M. & P.S. Ry. Co.*, 197 F. 624 (E.D. Wash. 1912) (meal periods and indefinite delays with no rest). Conversely, intermittent rest periods of three or four hours duration were held to be off duty time. *See, e.g., Southern Pac. Co. v. United States*, 222 F. 46 (9th Cir. 1915). In addition, courts were called upon to decide whether time spent by an employee deadheading to or from a duty assignment was on duty or off duty time. The courts unequivocally held that deadheading time should not be counted as "on duty" time. *See, e.g., United States v. Great Northern Ry.*, 285 F. 152 (9th Cir. 1922).

The ICC concurred with the judicial decisions holding that time spent deadheading was not time on duty under the HSA. *See, e.g.*, ICC Administrative Ruling No. 74 (1908), *reprinted in* ICC, The Hours of Service Act Administrative Rulings, at 3 (1926) (App. B). A related ruling further defined "on duty" time under the HSA as follows:

> The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service.

ICC Administrative Ruling No. 287 (1908), *reprinted in* ICC, The Hours of Service Act Administrative Rulings, at 4 (1926).

As explained in more detail *infra*, even though train crews were occasionally required to work right up to the

16-hour limit before being relieved from further train operating responsibilities, the Railroads are unaware of any judicial or ICC decision concluding that the time spent waiting for transportation by such "expired" crews should be classified as on duty time. The absence of litigation over this waiting period, in contrast to litigation over just about every other waiting period and time computation issue under the HSA, is but one demonstration of the fact that no one—not carriers, unions, or the government—considered the industry practice of working crews right up to the maximum hours of service to be violative of the Act.

Indeed, as explained in the Affidavits of D.C. Eubank (App. C), who has worked for CSXT and its predecessors since 1955, Robert C. Ewers (App. D), who has worked for NS or NW since 1965, Allan C. Fisher (App. E), who has worked at Conrail or its predecessors since the early 1970's, Wayne A. Hatton (App. F), who has worked at BN and its predecessors since 1966, Arthur Henson (App. G), who has worked for SP since 1946, and J.E. Sanford (App. H), who has worked at UP since 1955, which the Railroads submit in support of this Petition, the consistent industry practice has been not to consider such waiting time as on duty time. Classification of such waiting time as on duty time would not make sense because once relieved from duty, regardless of their location, even on a train, these employees were not operating trains.

Thus, from 1907 until 1966, time spent waiting for transportation by employees who had reached, or were about to reach, their HSA limit unquestionably was not counted as time on duty.

B. *1966 Congressional Hearings On Amendments To HSA*

In 1966, proposed legislation to amend the HSA was introduced in both houses of Congress, at the request of

the rail unions representing operating employees.[1] The principal purpose of this proposed legislation was to reduce the maximum hours of service from 16 to 12. The legislation, as introduced, also proposed to classify interim rest periods of three or more hours as off-duty time. As explained, the prevailing practice at the time, as reflected in the case law under the HSA, was to regard an off duty period of three or more hours "as breaking continuity of service." *Amend Hours of Service of 1907: Hearings on H.R. 5196 and 8476 Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 237 (1966) (statement of John H. Bush, Chairman, ICC) ("1966 House Hearings"); *see also Hours of Service of Railroad Employees: Hearings on S. 2180 Before the Surface Transp. Subcomm. of the Comm. on Commerce*, 89th Cong., 2d Sess. 148 ("1966 Senate Hearings").

As originally introduced, the bills did not contain any provision addressing treatment of deadhead time. The bills also did not address the issue of time spent waiting on a train by an "outlawed" crew for deadhead transportation. During the hearings on the 1966 proposals, however, the Brotherhood of Locomotive Firemen and Enginemen (now the United Transportation Union ("UTU")) advocated extension of time on duty to include time spent deadheading to and from duty assignment. 1966 House Hearings, at 289.

In the congressional hearings there was a great deal of testimony illustrating the industry practice of utilizing crews up to the maximum limit required by operating exigencies. For example, Rex Manion, Vice President Operations & Maintenance Department of the Association of American Railroads ("AAR"), testified as follows:

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[1] *See* S. 2180, 89th Cong., 2d Sess. (1966); H.R. 5196 and 8476, 89th Cong., 2d Sess. (1966).

> Suppose that a crew reaches the maximum limit of the hours-of-service law at a point 70 miles from its home terminal. . . . *The train would stop.*

1966 House Hearings, at 291 (emphasis added).

This testimony again demonstrated that the accepted practice under the HSA was to utilize crews up to the 16 hour limit on some occasions. In Mr. Manion's example, if waiting time was counted as time on duty, this crew should have had to shut down the train sufficiently in advance of reaching the 16-hour limit to allow for the arrival of transportation and a relief crew prior to the expiration of that limit. Further, as explained in the Eubank, Hatton, Henson, and Sanford Affidavits, Mr. Manion's testimony was consistent with the Railroads' practices at this time. Eubank Aff. ¶¶ 4-6; Hatton Aff. ¶ 6; Henson Aff. ¶ 4; Sanford Aff. ¶¶ 4-5. Neither the ICC nor the unions ever challenged this practice. In his Affidavit, Mr. Eubank explains that prior to 1969 his employer worked "a train crew the 16 hour maximum that was then applicable under" Eubank Aff. ¶ 4. "Any time spent by the train crew 16 hour period waiting for the arrival of transportation, of being transported back to a terminal where the crew's tour of duty would end, was considered off-duty time under" the HSA. *Id.* Similarly, as explained by Mr. Ewers, Mr. Hatton, Mr. Henson, and Mr. Sanford, the railroads they worked at also considered such time as off duty time during that period. Ewers Aff. ¶ 5; Hatton Aff. ¶ 6; Henson Aff. ¶ 4; Sanford Aff. ¶¶ 4-5.

Ultimately, the 1966 legislation never made it out of committee in either the House or the Senate. Rail labor would, however, urge the amendment of HSA again three years later.

C. *United States v. Pennsylvania Railroad*

In between congressional consideration of the HSA, the U.S. Attorney for the Western District of Pennsylvania, at the request of the ICC in its twilight as administrator of the HSA, brought an action in 1966 under the HSA against the Pennsylvania Railroad Company. In that case, apparently for the first time in the then 60-year history of the HSA, the government argued that time spent waiting for deadhead transportation by a crew, which had reached its maximum hours of service and been relieved from duty while still on the train, was on duty time for purposes of computing the maximum hours of service. The District Court found that such waiting time should be considered on duty time in *United States v. Pennsylvania Railroad*, 275 F. Supp. 345 (W.D. Pa. 1967).

In so ruling, the *Pennsylvania Railroad* court ignored the 60-year practice under HSA not to include such time as on duty time. Further, the *Pennsylvania Railroad* court misinterpreted the case law construing HSA, just as the Ninth Circuit would do 25 years later. The court relied on cases where the employees were required to return to service immediately following the break; none involved a situation where the employee had been relieved from further responsibility for operating the train.

The *Pennsylvania Railroad* case was an aberration in the history of the Act and was not followed by any other court until the *UTU v. Skinner* litigation nearly 25 years later. As explained *infra* at II.D, notwithstanding the *Pennsylvania Railroad* decision, both management and labor witnesses testified in the congressional hearings on the 1969 Amendments that the industry practice continued to be not to count time waiting for deadhead transportation by an expired crew as on duty time. *See* Eubank Aff. ¶ 6 (carrier practice did not change in light of *Pennsylvania Railroad* decision). Moreover, the Federal Railroad Administrator, who by then was charged with administering the HSA, did not even mention the

Pennsylvania Railroad case in his congressional testimony on the legislation which became the 1969 Amendments.

D. *1699 Amendments To HSA*

In 1969, legislation to amend the HSA, similar to that introduced in 1966, was reintroduced in Congress at the urging of rail labor.[2] Like the 1966 proposals, the 1969 bills proposed, *inter alia*, to reduce the maximum permissible hours of service from 16 to 12 and to count time spent on certain interim rest periods as time on duty. For the first time, the legislation also expressly proposed to count deadhead time both *to* and *from* duty assignment as "on duty" time for purposes of the maximum hours of service permitted under the HSA. The legislation, however, did not propose to reclassify time spent waiting for deadhead transportation by an expired crew as on duty time. In other words, with the exception of reducing the maximum hours of service and reclassifying deadhead transportation as on duty time, the legislation proposed to leave the existing industry practice under HSA as it was.

The House and Senate bills were the subject of extensive congressional hearings. The 1969 congressional testimony again established that the practice under the HSA was not to consider time waiting for deadhead transportation by an expired crew as on duty time. These hearings provide numerous examples of situations where an employee was not relieved from duty until he or she reached the 15 hour 59 minutes point. The following colloquy between Representative Tiernan and Charles J. Coughlin, the Grand Chief Engineer of the Brotherhood of Locomotive Engineers, was an example:

> Mr. Tiernan. Suppose the train is down the road, down the tracks 20 miles from the terminus and they get some difficulties in switching, or they get

[2] H.R. 8449 and S. 1938, 91st Cong., 1st Sess. (1969).

> put aside, and it goes 15 or 15½ hours they are out on the job.
>
> The dispatcher has to send a station wagon or other equipment or tell them to take a taxi back into town; is that correct?
>
> Mr. Coughlin. They often do that, yes sir.
>
> Mr. Tiernan. In other words, they have to get them off that equipment within the 16 hours?
>
> Mr. Coughlin. No. No. In your example this train breaks down 20 miles from the final terminal and the man is there 16 hours. *Many is the time that that man is liable to set there for 3 or 4 hours waiting for a car to come out and bring him in.*
>
> * * *
>
> Mr. Tiernan. *There is no safety violation there, in the sense that the crew cannot operate after 16 hours?*
>
> Mr. Coughlin. *That is correct.*
>
> * * *
>
> Mr. Coughlin. Let us take this example and if the carrier knows they cannot get you into your terminal within the 16 hours, *there is nothing to prevent the carrier from telling you to go off duty after you have been out there 15 hours and 59 minutes. Then you can wait there for 2 or 3 or 4 hours waiting for some type of transportation back into your home terminal* and they can call you within 8 hours after they have relieved you out on the road.

Hearings on H.R. 8449, H.R. 84, and H.R. 9515 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., at 114-15 (1969) ("1969 House Hearings") (emphasis added). As this colloquy shows, even the unions did not consider such waiting time as on duty time.

There was extensive debate regarding the proposed inclusion of deadhead transportation both to and from point of duty to an employee's terminal as time on duty. The railroad industry strongly opposed this aspect of the legislation, with industry witnesses explaining the operational problems that would result from including deadhead transportation in time on duty. For example, an SP executive testified that:

> Southern Pacific Co. opposes the provisions in bill S. 1938 which include time of deadheading to or from duty as time on duty. In the first place, although deadheading time is paid for to the men just the same as working time, the employees have no duties to perform. It is time used for relaxing and rest. Needed flexibility in crew handling to provide adequate service to customers would disappear. Operating employees would be away from home much longer and their expenses as well as company expenses will increase without any corresponding benefits to either.

House of Service of Railroad Employees: Hearings Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 159 (1969) (statement of Sam B. Burton, Manager of Personnel, Southern Pac. Co.) ("1969 Senate Hearings").

Likewise, AAR spokesperson Rex Manion testified to the adverse impact the legislation would have on railroad operations:

> Mr. Manion. Let's look just for a moment at our proposal with respect to changing the deadhead amendment.
>
> What is provided for in the bill before you and also the bill as it was passed in the House is extremely rigid and would tie the railroad's hands way beyond any reason. What we are proposing here would permit the use of deadheading, and it is greatly required

> to balance crews where there is an imbalance in a traffic flow which is the case on many railroads, to provide crews in the case of additional business, provide people in the case of somebody becoming ill and so forth, and our proposal would still permit this without hamstringing us in the framework if the new hours of service limitations. . . . Under our proposal, we have increased the flexibility very greatly so that we could still run the railroad, but it would not be a part of his rest time at all. This, we think, is a very practical amendment and we certainly would hope you would give it very serious consideration.
>
> Senator Pearson. What do you understand the House provision to be on deadheading? I have a note here that it counts for total time of service to work but not from work. . . . As proposed in the Senate bill, it would count both ways as part of the hours of service.
>
> Mr. Manion. The reason for the change in the House was recognition of the fact that the provision as it appeared in the bill to begin with was impossible. It would be impossible to get a crew home under the provisions of the bill because we would have violated the hours of service regardless of what we did with them.

Id. at 129-30.

Congress ultimately struck a compromise on the issue of deadhead transportation along the lines outlined in Mr. Manion's testimony. Only deadhead transportation *to* a duty assignment was to be included in time on duty. Deadhead transportation *from* a duty assignment to point of final release was not to be counted as time on duty. Deadhead transportation *from* a duty assignment was, however, no longer considered as off duty time either. Excluding such deadhead transportation from time on duty took cognizance of operating problems, and its exclusion from off duty time meant it would not be counted

toward an employee's rest. In effect, the legislative compromise created a limited third category of time, which came to be known as "limbo time."

The legislative compromise made sense because the HSA's purpose of fostering the safe operation of trains by rested crews is realized by counting the time spent by crews traveling to the point of duty at the start of an assignment. However, at the end of a duty tour, while waiting for deadhead transportation and travelling back to the designated terminal, the safety concern of HSA is not implicated, because expired crews will no longer perform "covered service," *i.e.*, "the actual assembling or operation of trains." 49 C.F.R. Pt. 228, App. A, at 176. The legislative compromise did not penalize the railroads if something delays the arrival of the relief crew and the deadhead transportation.

Significantly, there was no mention of the *Pennsylvania Railroad* case in the 1969 legislative hearings or legislative history. As discussed, although the Federal Railroad Administrator testified before the House and Senate Committees, he never once referenced this case.[3] Indeed, the FRA took no position on the legislation at all. If *Pennsylvania Railroad* actually reflected the government's interpretation of the HSA prior to 1969, surely the case or the issue presented there would have been discussed at some point during the extensive 1969 congressional hearings on the HSA Amendments. However, there was no such discussion. Further, as explained in the next section of this Petition, the *Pennsylvania Railroad* decision also did not represent the FRA's view of the HSA after 1969. The *Pennsylvania Railroad* case was an aberration in the

[3] Congress created the Department of Transportation as a cabinet-level agency and transferred jurisdiction over various transportation-related matters, including railroad safety and the HSA, to the Secretary of Transportation in 1966. The Secretary in turn delegated authority over the HSA to the FRA. Pub. L. No. 89-670, § 6, 80 Stat. 937 (1966) (codified at 49 U.S.C. § 1655(e)(2)).

history of the HSA not followed by anyone until *U.S. v. Skinner*.

In the 1969 Amendments, Congress codified many of the railroads' practices under HSA and modified some of the other practices. Congress modified the parties' practices by adopting a detailed, specific definition of on duty time to include time spent in deadhead transportation to an assignment and including time spent waiting for deadhead transportation after a tour of duty had ended as "limbo time." However, Congress, while aware of the parties' practice of classifying time spent waiting by a train crew after release from duty as time off duty, did not address that issue in the amendments. Nor did the more detailed statutory definition of "on duty" specifically include such waiting time. Therefore, Congress necessarily must have intended that waiting time by an expired crew be characterized as off duty time just as it had been for the previous six decades. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (Congress is presumed to know prior interpretation of law; if amended legislation does not conflict with the prior interpretation, it is presumed that the prior interpretation reflects congressional intent); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

E. *FRA's Administration of HSA Amendments*

During its administration of the HSA prior to 1992, the FRA never considered time spent waiting for transportation by an expired train crew, which had been relieved from further train operating responsibility, to be on duty time. Indeed, after providing the public with notice and an opportunity to comment on its proposed interpretation of the HSA as amended, *see* 41 Fed. Reg. 42692 (Sept. 28, 1976) (App. I); 42 Fed. Reg. 27594 (May 31, 1977) (App. J), the FRA issued an interpretation of the HSA in 1977 defining "covered service" under the Act as "the actual assembling or operation of trains."

49 C.F.R. Pt. 228, App. A, at 176. Obviously, a crew relieved from duty awaiting transportation is not engaged in the "actual assembling or operation of trains." After the 1969 Amendments, the FRA interpreted the HSA to provide that, like deadhead transportation from point of duty, such waiting time should be considered "limbo time," *i.e.*, neither on duty nor off duty time.

The FRA provided the public with notice and an opportunity to comment to determine "whether the proposed interpretations represent a realistic application of the statutory language to actual conditions in the railroad industry. . . . FRA is concerned that the Act be administered in a way which will serve the beneficient purposes of the Act without producing unintended and unnecessary problems for carriers and their employees." 41 Fed. Reg. at 42692-93. Ironically, by its new interpretation, FRA has effectively amended its prior definition of "covered service" arrived at after a proper notice and comment rulemaking procedure.

Even though Congress amended the HSA in 1976, 1980, and 1988, there was no contention that this waiting time by an expired crew should be considered as on duty time or that the FRA's interpretation should be legislatively overturned. Thus, in the 84-year history of the HSA, until 1992, time spent waiting for deadhead transportation from point of duty was never considered on duty time, with the lone exception of *Pennsylvania Railroad*. The FRA never followed *Pennsylvania Railroad* and criticized it on several occasions. For example, in a letter from Raymond K. James, FRA's Chief Counsel, to J.R. Snyder, UTU National Legislative Director, addressing whether HSA "requires that crews whose twelve hours have expired be speedily deadheaded to a designated terminal for rest," Mr. James explained that, while the HSA did not expressly address the issue, the *Pennsylvania Railroad* case dealt with it. However, Mr. James stated that there were "real practical problems" in applying the

rule of *Pennsylvania Railroad* "to the wide range of situations in which employees are forced to await deadhead transportation following the expiration of the statutory period." He explained that the *Pennsylvania Railroad* also did not further the safety purpose underlying HSA because "[f]aced with the prospect that delays (avoidable or otherwise) in getting crews to trains might be viewed by the FRA as violations in themselves, carriers might elect to continue such crews to their destinations." Accordingly, "because no concrete detriment to railroad safety is ordinarily involved," the FRA viewed time spent waiting for deadhead transportation as "limbo time." Letter from Raymond K. James, FRA Chief Counsel, to J.R. Snyder, UTU National Legislative Director (Oct. 20, 1977) (App. K); *see also* Letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, Esq. (Aug. 4, 1989) (characterizing *Pennsylvania R.R.* as overbroad and no longer providing "useful guidance as to the current requirements of the Act") (App. L).

FRA's position was consistent with the Railroads' experience, as explained in the Eubank, Ewers, Fisher, Hatton, Henson, and Sanford Affidavits. After the 1969 amendments, the railroads treated waiting time as "limbo time" and the *Pennsylvania Railroad* decision did not change the practice of the industry or the federal government's enforcement policy. Eubank Aff. ¶¶ 6-8; Ewers Aff. ¶¶ 5; Fisher Aff. ¶ 3; Hatton Aff. ¶¶ 5-6; Henson Aff. ¶¶ 5-6; Sanford Aff. ¶¶ 6-7. Thus, from 1907 to 1992, the consistent, accepted, well-understood practice under the HSA has been to consider the time spent waiting for deadhead transportation by an expired crew as either time off duty or limbo time, but not as time on duty.

III. THE NINTH CIRCUIT'S *UTU v. SKINNER* DECISION

Although the operating unions had accepted the classification of time waiting by an expired crew for deadhead transportation as off duty or limbo time for the 80 or so years of the HSA, sometime in the late 1980's, the UTU and the Brotherhood of Locomotive Engineers ("BLE") began agitating for litigation challenging the longstanding treatment of such waiting time as something other than on duty time. The UTU began soliciting its members for complaints regarding violations of the HSA and relaying these complaints to the FRA's regional offices.

Eventually, BLE and UTU instituted actions in federal district court in Oregon and in California challenging the FRA's interpretation of waiting time under the HSA. The lawsuits were triggered by a letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, attorney for the unions, which refused to reclassify all time spent waiting for deadhead transportation as time on duty, and characterized the *Pennsylvania Railroad* as overbroad and no longer providing "useful guidance as to the current requirements of the Act." The Oregon federal district court ruled in favor of BLE, while the California federal district court dismissed the UTU's complaint for lack of standing. In a consolidated appeal, the Ninth Circuit held that the FRA's interpretation was unreasonable and substituted the court's own interpretation that such waiting time should be counted as time on duty for purposes of the HSA. *UTU v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

In the Ninth Circuit, the FRA defended its interpretation of the statutory phrase "deadhead transportation by an employee from duty to his point of final release" as including time spent waiting for such transportation chiefly on the basis of the judicial deference to agency statutory interpretations required by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). While the court agreed that the HSA was ambiguous or silent on the issue in contention, it refused (wrongly, in the Railroads' view) to defer to the FRA. Instead, the Ninth Circuit found that the FRA's statutory interpretation was unreasonable and proceeded to substitute its own judgment for that of the FRA. The stated basis for the court's refusal to defer to the FRA's interpretation was the court's mischaracterization of pre-1969 case law under the HSA. The court found that the FRA's interpretation was

> at odds with an unbroken line of decisions by the Supreme Court and by this circuit that waiting time is time on duty under the HSA, and nothing in the 1969 amendments or in their legislative history contains any indication that Congress intended to change that longstanding rule.

975 F.2d at 1426.

In fact, with the one isolated exception of *Pennsylvania Railroad*, none of the cases relied upon by the Ninth Circuit even addressed the issue of time spent waiting for deadhead transportation.[4] Certainly, none, with the one exception, held it was time on duty. For this reason, it was unnecessary for Congress in 1969 to change the supposed "longstanding rule" that such waiting time was on-duty time. *There was no such rule.* To the contrary, as shown by the previous discussion and the Eubank,

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[4] These cases were: *Atchison, T. & S.F. Ry. v. United States*, 244 U.S. 336 (1917); *Missouri, K. & T. Ry. v. United States*, 231 U.S. 112 (1913); *United States v. Great Northern Ry.*, 285 F. 152 (9th Cir. 1922) (deadheading counted as time off duty); *United States v. Southern Pac. Co.*, 245 F. 722 (9th Cir. 1917); *Northern Pac. Ry. v. United States*, 220 F. 108 (9th Cir. 1915); *San Pedro, L.A. & S.L. R.R. v. United States*, 213 F. 326 (8th Cir. 1914); *United States v. Chicago, M. & S.P. Ry.*, 195 F. 783 (W.D. Wash. 1912); *United States v. Denver & R.G. R.R.*, 197 F. 629 (D.N.M. 1912).

Ewers, Fisher, Hatton, Henson, and Sanford Affidavits, the longstanding rule under the HSA was that such waiting time was not considered on duty time.

A review of the cases cited by the Ninth Circuit easily demonstrates that they do not support the court's erroneous conclusions. If the case involved waiting at all, the issue was whether intermittent short periods of release, *e.g.*, for meals or locomotive servicing, or delays caused by certain hindrances, after which the crew was required to resume operation of the train, constituted time on duty. *See, e.g., Atchison, T. & S. F. Ry.; Missouri, K. & T. Ry.; Southern Pac. Co.; Northern Pac. Ry.; Chicago, M. & S.P. Ry.; Denver & R.G. R.R.* These courts were only confronted with the question whether such periods broke the continuity of service for purposes of the HSA, not whether time spent waiting for deadhead transportation should be counted as time on duty, as the Ninth Circuit and the Oregon District Court implied. For this reason, the Supreme Court's pronouncement in *Missouri, K. & T. Ry.* that a crew is "nonetheless on duty when inactive '[t]heir duty is to stand and wait' " is inapplicable to the issue of time spent waiting for deadhead transportation. That case involved a crew waiting for its engine to be serviced before it *resumed* the same tour of duty, not a crew waiting for transportation after it *ceased* service. Other cases cited by the Ninth Circuit did not even involve any waiting period. For example, *Atchison, T. & S. F. Ry. v. United States*, 244 U.S. 336 (1917) involved whether exceeding the 16-hour limit was excused by the "Act of God" proviso to the HSA.

Proceeding from the demonstrably erroneous conclusion that, prior to 1969 and throughout the HSA's history, time waiting for deadhead transportation was uniformly considered time on duty, the Ninth Circuit went on to address the FRA's argument that the 1969 HSA Amendments reclassified such waiting time from time on duty to

limbo time. The court conducted a limited legislative history analysis to determine whether Congress expressed any intent to move waiting time out of the time on duty category and into the limbo time category. This inquiry was preordained to fail, because, as explained, except for the *Pennsylvania Railroad* case, no one either considered or treated this waiting time as time on duty under the HSA in the first place.

The court then rejected the FRA's argument that waiting time fell within the meaning of "in deadhead transportation" as it is stated in Section 61(b)(3)(C) of the HSA, which exempts deadhead transportation *from* duty to point of final release from the definition of time on duty. 45 U.S.C. § 61(b)(3)(C). In reaching this conclusion, the court pointed to language in the House Report accompanying the 1969 amendments that deadheading was "travel" and that "employees are riding as passengers," whereas employees who are waiting are not yet passengers. Rather, according to the court, they are still the crew of the train.

As a preliminary matter, the Ninth Circuit's recitation of language from the 1969 House Report is misleading. First, it referred to a definition not in the Act, "deadheading," instead of "in deadhead transportation." Although deadheading may connote travel, arguably only an overly narrow reading of the phrase "in deadhead transportation" would limit the meaning to just travel. Moreover, the court failed to recognize that, in the 1969 amendments, Congress implicitly included the waiting time that precedes deadhead transportation *to* duty assignment in the same category as the actual deadhead travel, *i.e.*, time on duty.

As the court accurately noted, the hearings record and the House and Senate Reports all focused on certain safety problems that had arisen in the industry because deadhead time and certain "rest periods" during a tour of duty had

been classified as time off duty. These safety concerns supported the reclassification of deadhead transportation *to* duty assignment and certain *interim* rest periods as time on duty based on the logical premise that the employee must operate or work in connection with the operation of a train *after* these periods of time. In that instance, the employee's fatigue may still affect the operation of the train. But Congress also recognized that deadhead transportation *from* duty did not present such safety concerns because the employee has been relieved from duty, even though not yet at the point of final release. The employee will not resume operation of the train until he has received the statutorily mandated rest period. Congress also knew that it would not further the safety objectives of the Act to classify the time spent deadheading *from* duty to point of final release as "time off duty," because the employees are not afforded real opportunities for rest. Thus, as explained *supra*, Congress struck a compromise that reclassified deadhead transportation time partially as time on duty and partially as "limbo time," *i.e.*, neither time on duty nor time off duty. This same congressional compromise reasonably supported the FRA's inclusion of time waiting for deadhead transportation in limbo time.

Another basis for the Ninth Circuit's decision was its misinformed belief, for which there was no record support,[5] that train crews retained duties even while awaiting deadhead transportation. The Ninth Circuit wrongly stated that "the parties agree that employees who must wait on a stopped train for the arrival of deadhead transportation bearing a relief crew retain certain contingent responsibilities and are not free to go and do as they

[5] Indeed, there apparently was no record, as such, before the court in *UTU v. Skinner* of how waiting time had actually been treated over time.

please." 975 F.2d at 1428. There was no such agreement by the parties. *See Brief of Appellant*, at 20-22, *UTU v. Skinner*, Nos. 91-35911 and 91-36061 (9th Cir. 1992).

Indeed, the FRA submitted contrary evidence before the district courts. For example, the Affidavit of Joseph W. Walsh, the FRA's Associate Administrator for Safety, was submitted before both district courts. In his affidavit, Mr. Walsh stated that "the agency has never interpreted the Act in such a way that 'if an employee was not free to come and go as he/she pleased at the point of relief, the time was considered on duty.' " Walsh Aff. ¶ 6. Similarly, in response to an affidavit submitted in support of the unions by R.E. Futrell, a former safety inspector for the FRA, Mr. Walsh stated that "the agency has never interpreted the Act in such a way that it was a violation if 'the crew was not free to leave the train at 12 hours.' If Mr. Futrell believed this was the correct interpretation, he was mistaken." *Id.* ¶ 8; *see also id.* ¶ 14 ("The fact that the crew was not permitted to leave the vicinity [of the train] is not sufficient to find that the crew was on duty.").

The court finally concluded that the FRA's inclusion of waiting time in deadhead transportation would "weaken the protections afforded the employees and the safety interests that underlie the HSA." 975 F.2d at 1428. This conclusion is demonstrably erroneous. If this statement were true, then the Ninth Circuit would also believe that Congress' action in creating the limbo time category weakened the employee protection and safety interests provided for by the HSA. Moreover, contrary to the assertions of the Oregon District Court, the FRA never argued that waiting time should be classified as time off duty. *See BLE v. Skinner*, No. 90-51-JV, slip op. at 8 (D. Or. 1991). Rather, it only contended that it should be classified as limbo time.

Thus, in its decision, the Ninth Circuit ignored the fact that Congress in the 1969 amendments codified the parties' practice under HSA of not including time waiting for deadhead transportation as on duty time. In addition, the Ninth Circuit also ignored the legislative compromise struck by Congress in those amendments and the rationale for that compromise, *i.e.*, that a balance must be struck between legitimate safety goals and railroad operating necessities.

IV. FRA AND UNION ACTIONS AFTER UTU V. SKINNER

In a letter dated October 28, 1992 from the FRA's Chief Counsel to the AAR, the Chief Counsel indicated the FRA's decision to accept the Ninth Circuit's decision, even while continuing to disagree with its rationale. The FRA stated that it would begin applying the Ninth Circuit's new interpretation of the HSA within the jurisdiction of that court effective November 1, 1992. Effective January 1, 1993, the FRA would extend this new interpretation to the rest of the country. Thus, ironically the FRA adopted as its official interpertation of the HSA a decision that is as vague and provides as little guidance as *Pennsylvania Railroad*.

During informal meetings with various railroad operating personnel after the FRA decided to adopt the Ninth Circuit's result, though not its reasoning, FRA officials initially indicated that what was of the most importance to the agency was good record keeping by the railroads and that carriers would not be penalized as long as crews were not kept waiting for an unreasonable amount of time. However, in a memorandum provided to certain railroads, which the FRA apparently now considers to be its final, new interpretation of the HSA on this issue, the FRA has adopted a much stricter interpretation of the HSA in light of the Ninth Circuit's decision. For example, while stating during the *UTU v. Skinner* litigation that the fact a crew was not free to leave the general vicinity of the train was not a *per se* violation of HSA, in the recent memorandum the FRA stated that this was no longer the case. Instead of determining violations of the HSA based on whether the crews performed any covered service, as was the practice in the past and is consistent with the underlying safety purpose of the HSA and reflects the balance struck by Congress in the 1969 legislative compromise, the FRA stated that the two critical events now for determining a violation are (1) the "time transportation *arrived*" and (2) the "time the expired crew ceased to be *the crew of the train.*" FRA Memo. 5 (emphasis in original).

Further, in response to inquiries by J.P. Jones, UTU's California State Legislative Director, the FRA stated that it views

> even limited incidental administrative actions as commingled with covered service even if such activity takes no more than a few minutes. *Accordingly, even a limited administrative task, despite its de minimis nature and probable lack of impact on railroad safety is considered time on duty for purposes of the Act.*

Letter from Perry A. Rivkind, FRA Acting Administrator, to J. P. Jones, UTU California State Legislative Director, at 1 (Jan. 27, 1993) (App. M). Emboldened by the FRA's extreme position, the UTU has instructed its members to report even the most de minimis of violations of the HSA to their representatives, who in turn will inform the FRA. *See* Letter from A.G. Delyea, UTU General Chairman to Local Chairmen, Santa Fe Coast Lines Feb. 12, 1993) (App. N.).

Thus, the FRA has decided upon an inflexible rule that fails to take into account the inherent unpredictability of rail operations and the essential need for flexibility in those operations. The FRA's new interpretation

is diametrically contrary to its 1977 interpretation, which had been adopted only after notice and comment were provided to ensure that "the Act be administered in a way which will serve [its] beneficient purposes . . . without producing unintended and unnecessary problems for carriers and their employers." 41 Fed. Reg. at 42693. Thus, FRA has in effect amended its prior interpretive ruling under the HSA, without providing any notice or comment.

In addition, as FRA admitted in its January 27 letter to the UTU, its interpretation fails to further the safety purposes underlying the HSA. Moreover, the new interpretation is contrary to the principle in the HSA that railroads have a "safe harbor" for the use of employees for a full consecutive 12-hour period. The HSA's 12-hour limit provides the railroads with a clearly demarked zone when it is necessary to work employees for the full statutory period to meet operating exigencies. With this knowledge, railroads have been able to schedule operations and respond to unforeseen circumstances with the flexibility that is so essential to the railroad industry. Indeed, this is what Congress intended in the 1969 amendments. The FRA's decision to classify waiting time as on duty time eviscerates the railroads' operational flexibility and has the effect of reducing the hours of service of railroad employees below the statutory provision of 12 hours, if a railroad is to comply with the FRA's new interpretation. This is so despite the fact that Congress, in the 1969 amendments where it modified some of the parties' practices under HSA, clearly did not do so with regard to the classification of waiting time for deadhead transportation.

As explained in the Affidavits accompanying this Petition, the FRA's new interpretation will result in hardship and operational problems for the rail industry, and administrative problems for the FRA, while failing to further the safety purposes of HSA.[6] In order to avoid penalties under the new interpretation, the Railroads will in many cases experience excessive delay to freight shipments and incur substantial expense by stopping trains short of their destination to avoid the possibility of noncompliance. For example, when a crew is running tight on time, but appears to be able to reach its final destination before expiration of the 12-hour limit, any unanticipated delay such as a defective air hose or stopping to inspect for a possible defect in equipment will result in a violation under the FRA's new interpretation. It is not possible under such circumstances to have transportation waiting for the crew at or near all points where an unanticipated stop could occur. Ewers Aff. ¶ 7.

Further, as explained in the Eubank Affidavit, before when a train crew completed 12 hours of service while still in transit, the carrier was required only to identify a point of rest enroute where the crew would tie up the train prior to expiration of its 12 hours. However, under FRA's new interpretation, a carrier must attempt to stop the train sufficiently in advance of 12 hours to permit deadhead transportation or a relief crew to be notified and to meet the crew at a tie-up point before the 12 hours have expired. This requires the railroad to reduce the time in which the train crew can actually operate

[6] Indeed, a recent General Accounting Office ("GAO") study of railroad compliance with the HSA's requirements revealed that railroads were in compliance with the Act 99.4 percent of the time. GAO Report at 2. In addition, GAO concluded that, from a safety standpoint, there was no need to reduce the maximum hours of service for engineers from 12 hours to 10 hours. *Id.* In arriving at its conclusions, GAO relied on data from four railroads, including BN, Santa Fe, and SP, which showed employees were sometimes worked up until the 12 hour limit. If these employees were then required to wait for deadhead transportation, it would be a violation of the HSA under FRA's new interpretation. However, in its report, GAO never stated that this was violative of the HSA. On the contrary, as explained, GAO found that the railroads were in compliance with the HSA over 99 percent of the time.

the train below the 12-hour period authorized by the HSA. Eubank Aff. ¶ 9; *see also* Fisher Aff. ¶¶ 6-8; Hatton Aff. ¶ 9; Sanford Aff. ¶¶ 8-9. In effect, the FRA administratively amended the HSA to reduce the maximum hours of service to less than 12 hours in many instances. Thus, FRA's new interpretation of HSA is contrary to the statute, the parties' past practices, and the realities of rail operations.[7]

V. REQUESTED ACTION

A. *Rescind New Interpretation*

The FRA must rescind its new interpretation of the HSA because it constitutes a substantive rule under the Administrative Procedure Act ("APA"). While the FRA was required to apply the Ninth Circuit's decision in *UTU v. Skinner* in that part of the country within the court's jurisdiction, it was under no legal compulsion to extend the decision to the rest of the nation. The FRA's voluntary decision to extend that decision nationwide, and its recent statements regarding what constitutes time on duty under HSA, constitute rulemaking under the APA. However, the FRA lacks rulemaking authority under HSA, 49 C.F.R. § 1.49(d); a fact it has recognized in the past. *See, e.g.*, Letter from Gregory B. McBride, Assistant Chief Counsel for Safety, to Lawrence M. Mann, Esquire (Aug. 4, 1989).

Notwithstanding the FRA's lack of rulemaking authority, it has promulgated a rule enforcing the HSA and binding the railroads subject to its jurisdiction. Under the APA, an agency is engaged in the "rulemaking" process when it formulates, amends, or repeals a rule. 5 U.S.C. § 551(5). The APA defines "rule" as

[7] The Railroads have also filed a petition for review of the FRA's new interpretation of the HSA with the United States Court of Appeals for the Seventh Circuit. *See Atchison, T. & S. F. Ry., et al. v. Department of Transp., et al.*, No. 93-1505 (7th Cir. filed Mar. 2, 1993).

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .;

Id. § 551(4).

The FRA's new interpretation of HSA "is an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," *i.e.*, a rule. *Id.* The FRA's action has changed the Railroads' expectations and practices under the HSA, and exposes the Railroads to liability if they fail to comply. Thus, because FRA lacks rulemaking authority, it must rescind its new interpretation of HSA for that part of the nation outside of the Ninth Circuit.

B. *Engage In A Rulemaking Procedure*

It is clear that the FRA's new interpretation and enforcement of HSA substantially impact the Railroads and change the requirements that must be met to comply with the law, even though FRA might attempt to characterize them as constituting an "interpretive" rule. Therefore, the rule is substantive in nature and requires a formal rulemaking procedure. However, even if the new interpretation is considered an "interpretive" rule, notice and comment should still be provided.

Notice with the opportunity to comment must be afforded to interested parties where, as here, a rule "is intended to have a substantial impact upon a regulated concern." *FLRA v. United States Dep't of Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992) (requiring notice and comment for interpretive rule that would bind regulated entity and "prohibit" what had previously been permitted). "If an agency seeks to apply a formal interpretation to future cases, fundamental fairness dictates that the affected public have at a minimum some con-

structive notice of the existence and content of that interpretation." *Id.* at 764. Indeed, as explained *supra*, that is exactly what FRA did in 1976 when it issued an interpretation of HSA, which defined, *inter alia*, "covered service." *See* 41 Fed. Reg. 42692 (Sept. 28, 1976); 42 Fed. Reg. 27594 (May 31, 1977). FRA provided notice and comment, because it was concerned about the impact its proposed interpretations would have on the day-to-day operations of the railroads. 41 Fed. Reg. at 42692. Further, it also was concerned about administering the HSA in a way that furthered safety, while at the same time avoiding unnecessary problems for the industry and the FRA. *Id.* at 42693.

The FRA should have done the same here, because it is clear that its new interpretation of the HSA will have a "substantial impact" on the Railroads' day-to-day operations without furthering the safety purposes of the Act. As explained in the Affidavits submitted in support of this Petition, the Railroads will experience great hardship because of the new interpretation in the form of fines, scheduling problems, and loss of flexibility in their operations. In addition, the new interpretation alters the longstanding definition of "covered service" under the HSA, which is "the actual assembling or operation of trains." 49 C.F.R. Pt. 228, App. A, at 176. Under FRA's new interpretation, covered service now includes the time spent waiting by expired crews for deadhead transportation. Thus, the new interpretation clearly alters the parties' settled practices under the HSA. As explained in the Affidavits, to comply with this interpretation and avoid liability, railroads will have to stop their crews well short of the 12 hour period to allow for waiting time.

Thus, before FRA can apply its "interpretive" rule under the HSA, it must provide notice of the new interpretation and the opportunity for interested parties to comment on the proposed rule as required by the APA, 5 U.S.C. § 553.

C. *Adopt The Interpretation Proposed By The Railroads*

As demonstrated by the foregoing discussion and the accompanying affidavits, the FRA's new interpretation of HSA is contrary to the 85-plus years of practice under the Act. The new approach serves no useful purpose, adds excessive and unnecessary operating costs, creates uncertainty regarding compliance with the HSA, and fails to advance the safety purposes underlying HSA. The Railroads request the FRA to adopt an interpretation outside of the Ninth Circuit that is consistent with the longstanding practice under HSA by classifying waiting time as off duty time.

In the alternative, the Railroads request that the FRA adopt its previous interpretation and consider such time as part of "limbo" time under HSA for that part of the country outside of the Ninth Circuit. While construing waiting time as off duty time is consistent with congressional intent, classifying such time as "limbo" time is certainly more consistent with the HSA than the Ninth Circuit's erroneous interpretation. If FRA chooses to adopt either of the interpretations suggested by the Railroads, notice and opportunity to comment will not be necessary because the FRA will simply be following its the longstanding, congressionally-ratified interpretation of the HSA.

While adoption of either of the suggested interpretations will lead to one interpretation of the HSA for that portion of the nation within the Ninth Circuit and one for the rest of the nation, that is a far more desirable situation than an erroneous interpretation of the HSA for the entire nation. Further, no matter what action FRA takes on the Railroads' Petition, there is certain to be more litigation over this issue, which will ultimately lead to a uniform interpretation of the HSA.

VI. CONCLUSION

As explained above, FRA's new interpretation of the HSA to include the time spent waiting by an "expired" crew for deadhead transportation as time on duty is contrary to the 85-plus years of practice under the HSA. The new interpretation will cause great hardship to the rail industry, while failing to further the underlying safety purposes of the HSA. FRA's new interpretation also constitutes substantive rulemaking despite its lack of rulemaking authority. Therefore, the Railroads respectfully request that FRA rescind its new interpretation and return to an interpretation of the HSA that classifies the time spent waiting by crews for deadhead transportation after being relieved from "covered service" as either time off duty or "limbo" time. In the alternative, even though FRA might label its actions as adoption of an "interpretive" rule, the APA nevertheless requires that interested parties be afforded notice and the opportunity to comment before FRA can enforce its new interpretation, which is what FRA has done in the past when adopting interpretive rules under the HSA.

Any comments, correspondence, or inquiries concerning this Petition should be addressed to the undersigned.

Respectfully submitted,

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Norfolk and Western Railway Co.,
Southern Pacific Transportation Co.,
Union Pacific Railroad Company

Dated: March 26, 1993

[Federal Register Notice, dated April 8, 1993]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228, Appendix A

Nationwide Applicability of a Decision of the United States Court of Appeals for the Ninth Circuit Concerning an Agency Interpretation of the Hours of Service Act; Miscellaneous Hours of Service Act Issues

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Statement of agency policy and interpretation.

SUMMARY: Notice is hereby given that, in acquiescence to the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union v. Skinner*, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall be treated by FRA as time on duty for purposes of the Hours of Service Act ("Act"), throughout the entire nation, and such time should be recorded as such and reports of excess service filed, as necessary, under the hours of service record keeping regulations. FRA is amending its current interpretive statement to reflect this policy change. In addition, FRA is amending the interpretive statement to reflect that the Rail Safety Enforcement and Review Act of 1992 has expanded the applicability of the Act and increased the maximum penalty for violations of the Act.

EFFECTIVE DATE: The agency interpretation contained in this document has previously taken effect, as explained below.

FOR FURTHER INFORMATION CONTACT: Edward R. English, Director, Office of Safety Enforcement, Office of Safety, FRA, 400 Seventh Street, S.W., Washington, DC 20590 (telephone: 202-366-9252); or David H. Kasminoff, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Washington, DC 20590 (telephone: 202-366-0635).

SUPPLEMENTARY INFORMATION:

Public Participation

In this notice FRA states that it has acquiesced in a decision of the United States Court of Appeals for the Ninth Circuit concerning the treatment of time spent awaiting arrival of deadhead transportation to the point of final release for purposes of the Act (45 U.S.C. 61-64b). Notice and comment procedures are unnecessary with regard to the general statement of policy and interpretation issued by this notice because such a statement is excepted from notice and comment procedure by virtue of 5 U.S.C. 553(b)(3)(A). Statements of policy are also an exception to the general requirement of publication at least 30 days prior to the effective date. See 5 U.S.C. 553(d)(2).

Effect of This Notice

On September 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its decision in the related cases of *United Transportation* v. *Skinner* (No. 90-16741) (*"UTU"*) and *Brotherhood of Locomotive Engineers* v. *Skinner* (Nos. 91-35911, 91-36061) (*"BLE"*). *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992). Those cases concern FRA's interpreta-

tion of the Act as it pertains to the status of train crew members waiting for deadhead transportation to their point of final release.

The Court of Appeals upheld the decision of the district court in Portland in *BLE*, which found that all time spent waiting for transportation is to be considered on-duty time. In the *UTU* case, which was an appeal from the district court in San Francisco, the Court of Appeals affirmed the district court's order of dismissal as to the claims for injunctive relief and mandamus, but reversed the district court's dismissal of the entire case and remanded the case to that court for further proceedings consistent with the appellate court's opinion on the interpretive issue.

FRA has traditionally considered an employee on duty during the time spent awaiting arrival of the deadhead vehicle only if the employee actually has duties to perform. If the railroad had relieved the employee of all responsibility, we had considered the time spent merely waiting for the deadhead vehicle to arrive as "limbo time" (i.e., neither on nor off duty) for hours of service purposes.

Although we do not agree with the court's legal rationale, we have decided to accept its decision and treat it as binding. Given the ambiguity of the Act's pertinent provisions, the issue has always been a close one. While we do not agree that the conclusion reached by the court is compelled by previous case law, we believe the court's reading of the statute, like the interpretation FRA has held until now, to be reasonable.

Our traditional interpretation was based on the assumption that some railroads might choose to continue crews in train operation if having the crews tie up the train and await deadhead transportation would itself constitute a violation. We did not wish to encourage the less safe alternative of having the crews continue train operation after

expiration of their legally permissible hours. However, we had not seen evidence of such behavior in Oregon, where the interpretation of the district court had been in effect for more than a year. With increased penalties and individual liability now available for violations of the Act, we are more convinced that railroads will work to avoid violations and, if faced with an inevitable violation, choose the safer alternative.

Although awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly, FRA will, of course, continue to exercise its prosecutorial discretion, as it does in all areas, in deciding which cases warrant civil penalties or other enforcement action. Moreover, where civil penalties are assessed, FRA will treat more harshly the violations that are more likely to have a serious impact on safety, i.e., those violations involving actual train operation after the period permitted by the Act. In addition to the legal incentives to encourage compliance, it appears that railroads have an economic incentive to minimize time spent awaiting deadhead transportation, which is wholly unproductive time.

As our original interpretation made clear, we have long been concerned about the instances in which employees are held on trains for several hours awaiting deadhead transportation even in the absence of any valid emergency that might explain such an occurrence. To the extent the waiting periods are extremely lengthy, there is a chance that they could contribute to the cumulative exhaustion of the employee, despite the fact that the legally required rest period is provided upon arrival at the point of final release. In some cases, the railroads have "relieved" employees on the expiration of 11 hours and 59 minutes, which has meant that the employee was guaranteed as little as 8 hours off after having been involved in many hours of service for the carrier (e.g., almost 12 hours "on duty," several hours spent waiting, and potentially several

hours in deadhead transportation to the point of "final release"). Thus, to the extent that application of the Ninth Circuit's decision reduces the frequency of such instances, it should contribute to safety.

It is not unreasonable to posit that the Congress considered the proportionality of work and rest periods, in addition to their absolute duration, when fashioning the Act. Application of the Act in the manner required by the Ninth Circuit is also generally consistent with contemporary learning with respect to maintaining the alertness of shift workers.

Accordingly, in the interest of uniform application of the Act and to promote the safety of railroad operations, we are treating the Ninth Circuit's opinion as binding in the entire nation. We have done so in two stages. We considered the court's reading of the Act binding within the Ninth Circuit beginning at 12:01 a.m. on November 1, 1992. The Ninth Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. We chose November 1 because that date was likely to precede or be very close to the issuance of the mandate by the Court of Appeals and railroads within that circuit have had every reason to expect that its mandate would be honored.

This meant that, starting on November 1, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release, if it occurred within the territory of the Ninth Circuit, was to be treated as time on duty, and such time was to be recorded as such and reports of excess service filed, as necessary, under 49 CFR part 228, subpart B.

For the remainder of the nation, we believed that a period of adjustment was necessary in order to permit railroads to train their employees who will be responsible for implementation of the decision. Railroads with operations outside the Ninth Circuit have not had reason, until

very recently, to believe those operations would be affected by the court's decision. We believed a period of 60 days would permit the necessary training to occur. Accordingly, we began to apply the Ninth Circuit's decision to operations outside that circuit at 12:01 a.m. on January 1, 1993.

In November 1992, FRA mailed copies of a letter to affected railroads that operate within the Ninth Circuit providing actual notice of the court's decision. At the same time, we wrote to the Association of American Railroads asking its cooperation in making known to its member railroads our intention to enforce the court's decision nationwide beginning January 1, 1993. This published notice is intended to further ensure that all concerned parties are in fact informed of our new policy.

On March 2, 1993, pursuant to 28 U.S.C. 2342(7), FRA was served with a Petition for Review of Agency Action filed in the United States Court of Appeals for the Seventh Circuit by The Atchison, Topeka, and Santa Fe Railway Company; the Burlington Northern Railroad Company; the Consolidated Rail Corporation; CSX Transportation, Inc.; the Illinois Central Railroad Company; the Norfolk Southern Railway Company; the Norfolk and Western Railway Company; the Southern Pacific Transportation Company; and the Union Pacific Railroad Company (Railroads). *Atchison, Topeka, and Santa Fe Railway Co. v. Peña* (No. 93-1505). The Railroads request that the court order FRA to rescind nationwide application of its new interpretation of the Act, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask the court to interpret the Act as providing that time spent waiting by a train crew which has been relieved from further operating duties is not on-duty time for purposes of the Act.

FRA is amending its current interpretive statement in appendix A to 49 CFR part 228 to reflect the fact that

although time spent in deadhead transportation from the final duty assignment of the work tour to the point of final release is not computed as either time on duty or time off duty, all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release shall be treated by FRA as time on duty for purposes of the Act.

Miscellaneous Issues

FRA is also amending its current interpretive statement in appendix A to 49 CFR part 228 to reflect the fact that section 5(a)(1) of the Act was amended by section 4 of the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, by striking "penalty of up to $1,000 per violation, as the Secretary of Transportation deems reasonable," and inserting in lieu thereof "civil penalty, as the Secretary of Transportation deems reasonable, in an amount not less than $500 nor more than $10,000, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty of not to exceed $20,000 may be assessed," and by adding at the end the following sentence: "In compromising a civil penalty assessed under this section, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed, and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior or subsequent offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."

In addition, section 5(a)(1) of the Act was amended by section 9 of the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, by striking the parenthetical clause and inserting, in lieu thereof, the following: "(including but not limited to a railroad; any manager, supervisor, official, or other employee or agent

of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor)."

List of Subjects in 49 CFR Part 228

Penalties, Railroad employees, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR part 228 is amended as follows:

PART 228—[AMENDED]

1. The authority citation for 49 CFR part 228 is revised to read as follows:

Authority: 45 U.S.C. 61-64b, as amended; 45 U.S.C. 437 and 438, as amended; Public Law 102-365; 49 App. U.S.C. 655(e), as amended; 49 CFR 1.49(d) and (m).

2. Appendix A to part 228 is amended:

(a) By adding a new paragraph after the first paragraph of *Deadheading*, under the undesignated centerheading "Train and Engine Service," and

(b) By revising the paragraphs for *Penalty* under the undesignated center heading "General Provisions" to read as follows:

Appendix A to Part 228—Requirements of the Hours of Service Act: Statement of the Agency Policy and Interpretation

* * * *

Train and Engine Service

* * * *

Deadheading. * * *

All time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment

of the work tour to the point of final release is considered on-duty time, regardless of whether the employee is given specific responsibilities to perform during this time. Although awaiting deadhead transportation constitutes time on duty and FRA enforces the Act accordingly, FRA treats more harshly violations that are more likely to have a serious impact on safety, *i.e.*, those violations involving actual train operation after the period permitted by the Act.

* * * *

General Provisions

(Applicable to all Covered Service)

* * * *

Penalty. As amended by the Rail Safety Improvement Act of 1988 and the Rail Safety Enforcement and Review Act of 1992, the penalty provisions of the law apply to any "person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor), except that a penalty may be assessed against an individual only for a willful violation. See appendix A to 49 CFR part 209. For violations that occurred on or after September 3, 1992, a person who violates the Act is liable for a civil penalty, as the Secretary of Transportation deems reasonable, in an amount not less than $500 nor more than $10,000, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $20,000 may be assessed.

Each employee who is required or permitted to be on duty for a longer period than prescribed by law or who

does not receive a required period of rest represents a separate and distinct violation and subjects the railroad to a separate civil penalty. In the case of a violation of section 2(a)(3) or (a)(4) of the Act, each day a facility is in noncompliance constitutes a separate offense and subjects the railroad to a separate civil penalty.

In compromising a civil penalty assessed under the Act, FRA takes into account the nature, circumstances, extent, and gravity of the violation committed, and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior or subsequent offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

* * * *

Issued in Washington, DC, on April 2, 1993.

S. Mark Lindsey,
Acting Federal Railroad Administrator.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2378

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
Schaumburg, Illinois 60173,

BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
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CONSOLIDATED RAIL CORPORATION
Two Commerce Square
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CSX TRANSPORTATION, INC.
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ILLINOIS CENTRAL RAILROAD COMPANY
455 North Cityfront Plaza Drive
Chicago, Illinois 60611,

NORFOLK SOUTHERN RAILWAY COMPANY
Three Commercial Place
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NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FREDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

S. MARK LINDSEY
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. § 2342(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents' erroneous interpretation and application of the

Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66. On April 8, 1993, the Federal Railroad Administration ("FRA") published in the *Federal Register* a "Statement of Agency Policy and Interpretation" amending the FRA's prior interpretation of the HSA. 58 Fed. Reg. 18,163-66 (Apr. 8, 1993) (attached as Appendix A).

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent FRA considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Despite the fact that both the Railroads and FRA disagree with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide on January 1, 1993.

In FRA's April 8, 1993 "Statement of Agency Policy and Interpretation," FRA reiterates its disagreement with the Ninth Circuit's "legal rationale" yet continues to adhere to that erroneous rationale. In its *Federal Register* notice, the FRA amended the interpretive statement in appendix A to 49 C.F.R. part 228 "to reflect the fact that . . . all time spent awaiting the arrival of deadhead tarnsportation to the point of final release shall be treated by FRA as time on duty for purposes of [HSA]." 58 Fed. Reg. at 18,165. The FRA's actions are contrary to the statutory language and 85-plus year history of the HSA. FRA's actions in including the time spent waiting by a train crew that has been relieved from further operating duties as on duty time under the HSA and extending its erroneous interpretaton of the HSA nationwide are arbitrary, capricious, and not in accordance with the law and contrary to the HSA. In addition, the FRA's actions violate the Administrative Procedure Act ("APA"), because the agency engaged in rulemaking without providing the public notice of the proposed rules and an opportunity for interested parties to comment on the proposed rule.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further operating duties is not on duty time under the HSA. Such an interpretation is required by the statute and the legislative history.

The Railroads have previously petitioned this Court for review of prior FRA actions in violation of the HSA and APA, *see Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena, et al.*, No. 93-1505 (filed Mar. 2. 1993). Further, on March 26, 1993, the Railroads filed with the FRA a Petition for Interpretation of the HSA. The FRA has stated that it will issue an order in response to the Railroad's Petition for Interpretation by June 15, 1993. On April 21, 1993, this Court ordered the appeal in Docket No. 93-1505 held in abeyance pending the FRA's June 15 order. The Railroads will also file a motion to hold their appeal of FRA's April 8 *Federal Register* order in abeyance pending the FRA's resolution of the Railroad's Petition for Interpretation. In addition, at a later date, the Railroads will move to consolidate this appeal with the appeal in Docket No. 93-1505.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

/s/ Mark V. Holden

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Dated: June 7, 1993

[Appendix A and Certificate of Service Omitted in Printing]

[July 1, 1993, letter from Grady C. Cothen, Jr. to Ronald M. Johnson and Mark V. Holden]

U.S. Department
of Transportation

Federal Railroad
Administration

Office of the Administrator

400 Seventh St. S.W.
Washington D.C. 20590

[Jul. 1 1993]

BY HAND

Ronald M. Johnson, Esq.
Mark V. Holden, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: Petition for Interpretation of the Hours of Service Act

Dear Mr. Johnson and Mr. Holden:

On March 26, 1993, FRA was served with a Petition for Interpretation of the Hours of Service Act ("Act") by The Atchison, Topeka, and Santa Fe Railroad Company; the Burlington Northern Railroad Company; the Consolidated Rail Corporation, CSX Transportation, Inc.; the Illinois Central Railroad Company; the Norfolk Southern Railway Company; the Norfolk and Western Railway Company; the Southern Pacific Transportation Company; and the Union Pacific Railroad Company ("Railroads"). Further, on May 19, 1993, the Railroads filed a Supplement to their Petition.

In that Petition and its Supplement, the Railroads request that FRA rescind nationwide application of its new interpretation of the Act, in which FRA states that all time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment of the work tour to the point of final release is considered on-duty time, regardless of whether the employee is given specific responsibilities to perform during this time. In the alternative, the Railroads argue that since, in their view, FRA's new interpretation will have a substantial impact on the day-to-day operations of the Railroads, FRA should provide the opportunity for notice and comment in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). As a third alternative, the Railroads ask FRA to adopt one of two interpretations they favor, *i.e.*, that time spent awaiting deadhead transportation is time off duty, or that such time is "limbo" time (neither on-duty nor off-duty time).

As a threshold matter, FRA notes that its rules of practice, 49 C.F.R. Part 211, do not provide any procedure for handling a "petition for interpretation." Accordingly, without reaching its merits, FRA could simply dismiss the Petition as improperly filed. However, because one aspect of the Petition could arguably be read as a petition for rulemaking, and in order to avoid debate at this time over issues of administrative procedure, FRA has decided to entertain the Petition. For the reasons set forth below, FRA denies all of the Railroads' requests.

The FRA interpretation in dispute applies the decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner,* 975 F.2d 1421 (9th Cir. 1992) nationwide. In both our October 28, 1992 letter to Robert W. Blanchette, Vice President-Law and General Counsel of the Association of American Railroads ("AAR") (Blanchette letter), and in our Statement of Agency Policy and Interpretation" (58 Fed. Reg.

18,163) (April 8, 1993) (Federal Register notice), we acknowledged our disagreement with the court's legal rationale, but conceded both the ambiguity of the Act's pertinent provisions and the reasonableness of the court's reading of the statute. Accordingly, in the interest of uniform application of the Act and to promote the safety of railroad operations, we decided to treat the court's opinion as binding throughout the entire nation.

The Petition and Supplement provide no persuasive rationale for rescinding FRA's new interpretation. The legal arguments presented by the Railroads are essentially those on which FRA relied, unsuccessfully, in *UTU* v. *Skinner*. Obviously, FRA was aware of those arguments when it decided to accept the Ninth Circuit's ruling. The Petition includes affidavits from various railroad officials designed to show how the Act had been applied historically. While their recollections may be fully correct, they have no bearing on what FRA now believes to be the correct reading of the Act. Therefore, we see nothing in the Petition or supplement that persuades us to rescind the agency's current interpretation or adopt either of those preferred by the railroads.

Moreover, FRA does not believe that it is obligated to provide notice and an opportunity to comment on its revised interpretation, or that doing so would be useful at this time. FRA's interpretation is an "interpretative rule" and statement of policy within the meaning of the APA, 5 U.S.C. § 553(b)(A). As such, notice and comment were not required prior to its publication. As the agency charged with enforcing and administering the Act, FRA has inherent authority to issue interpretive rules informing the regulated community of the procedures and standards that it intends to apply in exercising its discretion. *See Metropolitan School District of Wayne Township* v. *Davila*, 969 F.2d 485, 490 (7th Cir. 1992); *Production Tool* v. *Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982) (citing *General Electric Co.*

v. *Gilbert*, 429 U.S. 125 (1976)). Moreover, given the nature of the subject—the proper reading of the Act—there would seem to be nothing to be gained from public comment, as FRA is fully familiar with the legal arguments on both sides of the issue.

The Railroads argue that FRA's interpretation actually constituted a substantive rule. However, other than by arguing that the interpretation will have an impact they disfavor, the Railroads do not explain how FRA's statement of its reading of the Act constitutes substantive rulemaking. Every interpretation is likely to disfavor someone, but that does not make every interpretation an exercise of legislative rulemaking authority.

This is especially true where, as here, the agency lacks legislative rulemaking authority on the subject. The Railroads concede on pages 33 and 34 of their March Petition that FRA lacks rulemaking authority under the Act. (The lone exception, dealing with employee sleeping quarters, is not relevant here.) In the absence of a delegation of legislative authority, a rule is considered interpretive even if it affects the rights and obligations of a party. *Production Tool*, 688 F.2d at 1166; *See Alcaraz* v. *Block*, 746 F.2d 593 (9th Cir. 1984); *Rivera* v. *Becerra*, 714 F.2d 887 (9th Cir. 1983). Accordingly, notice and comment procedures were unnecessary with regard to FRA's general statement of policy and interpretation because such a statement is expected from notice and comment procedure by virtue of 5 U.S.C. § 553(b)(A). Even assuming that FRA's interpretation has a substantial impact upon the Railroads, the Supreme Court, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), cast considerable doubt upon the viability of cases holding that the notice and comment procedure may be judicially required even where not required by the terms of the APA. *See also Rivera*, 714 F.2d at 890, 891. Statements of policy are also an exception to the general

requirement of publication at least 30 days prior to the effective date. 5 U.S.C. § 553(d)(2).

Further, the Railroads argue that even assuming FRA's new interpretation is interpretive, ". . . fundamental fairness dictates that the affected public have at a minimum some constructive notice of the existence and content of that interpretation" (quoting language from *FLRA* v. *United States Department of Navy*, 966 F.2d 747, 764 (3d Cir. 1992)). While the Railroads are obviously correct in their assertion, they neglect to admit that FRA provided something more than just constructive notice—FRA also gave *actual* notice to the Railroads. Copies of the Blanchette letter were mailed to all roadroads that operate in the Ninth Circuit, including four of the petitioner Railroads. Also, in the Blanchette letter, FRA requested that the AAR inform its member railroads (which include all petitioner Railroads) of FRA's revised interpretation. Apparently, AAR did so. In fact, at least one of the petitioner Railroads received a copy of an FRA technical bulletin on this subject issued after the Blanchette letter. *See* notation at top of Appendix A to Petition. Finally, any question of constructive notice has been eliminated by FRA's publication of its Federal Register notice on April 8, 1993.

The Railroads note that in 1976 FRA sought public comment prior to issuing its "Statement of Agency Policy and Interpretation on the Hours of Service Act, as Amended." *See* 41 Fed. Reg. 42,692 (September 28, 1976), and 42 Fed. Reg. 27,594 (May 31, 1977) (codified at Appendix A to 49 C.F.R. Part 228, as amended). The Railroads argue that the fact that FRA provided notice and opportunity for comment at that time is somehow precedential, and also argue that the 1977 statement spoke to the present issue by defining "covered service." Petition at 35-36. FRA disagrees on both scores.

In its 1976 Notice of Agency Interpretation, FRA stated that the Act had recently been amended in several significant respects, and sought public comment as to whether the proposed interpretation would realistically apply the statutory language to actual conditions in the railroad industry. 41 Fed. Reg. at 42,692. However, FRA specifically stated that public proceedings concerning publication of an appendix to 49 C.F.R. Part 228 were not required by law or agency rules. *Id.* at 42,693. By contrast, the issue now before FRA stands alone and has a long history of interpretation and application with which FRA is fully familiar. Accordingly, FRA acted voluntarily—not because of the APA—when it provided an opportunity for comment in 1976, but had no similar incentives to seek comment in this situation and was under no legal obligation to do so.

Moreover, the 1977 policy statement did not address the proper treatment of time spent awaiting deadhead transportation from duty. That statement's definition of "covered service" is irrelevant, because the issue is whether waiting time is time on duty, whether it be commingled or covered service. Actually, the interpretation that FRA recently adopted overturns an earlier interpretation embodied only in letters (*e.g.*, Appendices K and L to Petition). Therefore, it is simply not true to suggest that FRA has overturned by letter interpretation a position previously embodied in a published interpretation.

Finally, the Petition (at 2) cites an FRA memorandum (Appendix A to Petition) as the embodiment of FRA's interpretation. Actually, the interpretation is embodied in the Blanchette letter and the April 8, 1993 Federal Register notice. The memorandum constitutes field guidance on application of the interpretation. In its guidance to its field inspectors, FRA tried to anticipate factual scenarios that may not have been squarely addressed in the Ninth Circuit's opinion.

For example, the memorandum addresses the situation in which the first crew is ordered to leave the vicinity of the

train (*e.g.*, by walking to a restaurant), but no deadhead transportation has arrived. Even if the crew gets off the train and walks to a nearby restaurant, the crew is still considered *on duty* until deadhead transportation arrives.

We have given your Petition and its Supplement every consideration, but conclude that we cannot grant the relief requested. Accordingly, as set forth above, we must deny that Petition.

Sincerely yours,

/s/ Grady C. Cothen, Jr.
GRADY C. COTHEN, JR.
Acting Administrator

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2712

THE ATCHISON, TOPEKA, AND SANTA FE
RAILWAY COMPANY
1700 East Golf Road
Schaumburg, Illinois 60173,

BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
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CONSOLIDATED RAIL CORPORATION
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CSX TRANSPORTATION, INC.
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ILLINOIS CENTRAL RAILROAD COMPANY
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NORFOLK SOUTHERN RAILWAY COMPANY
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NORFOLK AND WESTERN RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510,

SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FREDERICO PENA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

GRADY C. COTHEN, JR.
Acting Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. § 2343(7), Petitioners The Atchison, Topeka, and Santa Fe Railway Company ("Santa Fe"), Burlington Northern Railroad Company ("BN"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), Illinois Central Railroad Company ("IC"), Norfolk Southern Railway Company ("NS"), Norfolk and Western Railway Company ("NW"), Southern Pacific Transportation Company ("SP"), and Union Pacific Railroad Company ("UP") (hereinafter "Railroads") Petition for Review of the Respondents' erroneous interpretation and application of the Hours of Service Act ("HSA"), 45 U.S.C. §§ 61-66.[1] On July 1, 1993, the Federal Railroad Administration ("FRA") denied the Petitioners' Petition for Interpretation. *See* Letter from Grady C. Cothen, Jr., Acting FRA Administrator, to Ronald M. Johnson and Mark V. Holden (July 1, 1993) ("July 1 Decision") (attached as Appendix A).

In their Petition for Interpretation and the Supplement to the Petition, the Railroads requested that the FRA rescind naionwide application of its new interpretation of the HSA and return to the prior longstanding interpretation of HSA. In the alternative, the Railroads requested that FRA provide interested parties with notice of the new interpretation and an opportunity to comment on that interpretation, as required by Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

Since the HSA was enacted in 1907, the time spent waiting by a train crew for transportation, after being relieved from any further train operating duties, was never considered "on duty" time for purposes of calculating the maximum period that a train crew can be on duty under the HSA. Such time was considered off duty time at least until the 1969 amendments to the HSA. After the 1969 amendments, Respondent FRA considered such time to be "limbo time," *i.e.*, neither on duty nor off duty time. FRA now seeks to reinterpret the HSA and reclassify this waiting time as on duty time, based on the

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[1] The Railroads have previously petitioned this Court for review of prior related Federal Railroad Administration actions in violation of the HSA and Administrative Procedure Act, *see Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena, et al.*, No. 93-1505 (filed Mar. 2, 1993); *Atchison, Topeka, and Santa Fe Railway Co., et al. v. Pena., et al.* No. 93-2378 (filed June 7, 1993). On June 24, 1993, the Court by its own motion consolidated these two appeals. The Railroads have filed a separate Motion to Consolidate this appeal with the pending appeals in Nos. 93-1505 and 93-2378.

United States Court of Appeals for the Ninth Circuit's decision in *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992) (*"UTU v. Skinner"*). Even though FRA disagrees with the Ninth Circuit's interpretation of the HSA, FRA, which was under no legal compulsion to do so, extended the Ninth Circuit interpretation to all railroads nationwide effective January 1, 1993.

In their Petition and Supplement to FRA, the Railroads pointed out that such waiting time had never before been considered on duty time under HSA; rather, it was considered off duty time or "limbo" time. The Railroads also demonstrated that FRA's interpretation was contrary to the established case law, legislative history, and longstanding past practice under HSA. FRA nonetheless concluded that the Petition and Supplement "provide no persuasive rationale for rescinding FRA's new interpretation." July 1 Decision at 2.

Despite the fact that FRA provided interested parties with notice and an opportunity to comment in 1976 prior to issuing its previous "interpretation" of "covered service" under HSA, which was effectively amended by the FRA's new interpretation, FRA claimed that it was not required to give notice and comment to the Railroads prior to adopting its new interpretation of the HSA. FRA maintained that its new interpretation is not a substantive or legislative rule within the meaning of the APA. Rather, FRA claimed that its new interpretation is an "interpretative rule" and statement of policy, which is exempt from APA's notice and comment requirements. In any event, FRA stated that its October 28, 1992 letter to the General Counsel of the Association of American Railroads satisfied any notice requirement it may have had. July 1 Decision at 3. Finally, in the July 1 Decision FRA admittedly extended its erroneous interpretation of the HSA beyond the scope of the Ninth Circuit's decision in *UTU v. Skinner.* July 1 Decision at 4-5 ("FRA tried to anticipate factual scenarios that may not have been squarely addressed in the Ninth Circuit's opinion. . . .

Even if [a train] crew gets off the train and walks to a nearby restaurant, the crew is still considered *on duty* until deadhead transportation arrives.") (emphasis in original).

Thus, in the July 1 Decision, FRA continued to interpret and apply HSA contrary to the prior, longstanding interpretation and application of the statute. FRA's July 1 Decision is arbitrary, capricious, and not in accordance with the law and contrary to the HSA. In addition, FRA's new position is not supported by any substantial evidence. Further, contrary to its claims in the July 1 Decision, FRA's new interpretation of HSA constitutes a substantive rule within the meaning of the APA, and it was therefore required to provide interested parties with notice and comment prior to implementing its new interpretation.

The Railroads request that this Court order the FRA to rescind nationwide application of its new interpretation of HSA, provide notice to the public of its new interpretation, and provide interested parties with an opportunity to comment. In the alternative, the Railroads ask this Court to interpret the HSA to provide that time spent waiting by a train crew which has been relieved from further duties is not on duty time under the HSA. Such an interpretation is required by the statute, its legislative history, and the longstanding application of the HSA in this manner.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, because Petitioner IC's principal office is located in Chicago, Illinois.

Respectfully submitted,

/s/ Mark V. Holden
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(202) 887-4000

Attorneys for Petitioners

Dated: July 16, 1993

[Appendix A and Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Petitioners,

v.

FEDERICO PEÑA, *et al.*,
Respondents.

and

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,
Intervening Respondents.

CERTIFIED LIST OF DOCUMENTS COMPRISING THE ADMINISTRATIVE RECORD

In accordance with Rule 17 of the Federal Rules of Appellate Procedure, the undersigned, Pat McLaughlin, Docket Clerk of the Federal Railroad Administration (FRA), certifies the following to be a list of all documents, transcripts, exhibits and other materials comprising the administrative record in this matter:

(1) Letter from Lawrence M. Mann, Alper & Mann, to former FRA Associate Administrator for Safety, Joseph W. Walsh, inquiring as to how FRA has applied the Hours of Service Act to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours, dated 8/17/88.

(2) Letter from Gregory B. McBride, former FRA Assistant Chief Counsel for Safety, to Lawrence M. Mann, Alper & Mann, addressing how the Hours of Service Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours, dated 8/04/89.

(3) Final report by FRA's Office of Policy, No. 91-01, entitled "Issues in Locomotive Crew Management and Scheduling," dated 2/91.

(4) Report by the General Accounting Office to the Chairman, Committee on Energy and Commerce, U.S. House of Representatives, entitled "Railroad Safety: Engineer Work Shift Length and Schedule Variability," GAO/RCED 92-133, dated 4/10/92.

(5) Final report by FRA's Office of Research and Development, No. 92-17, entitled "Engineman Stress and Fatigue: Pilot Tests," dated 6/92.

(6) Decision of the United States Court of Appeals for the Ninth Circuit in *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992), dated 9/22/92.

(7) Motion For attorneys' fees in the amount of $22,309.89, and memorandum of points and authorities in support of request for attorneys' fees filed in the United States District Court for the District of Oregon by the Brotherhood of Locomotive Engineers, dated 10/21/92.

(8) Motion For attorneys' fees in the amount of $10,684.24, and memorandum of points and authorities in support of request for attorneys' fees, filed in the United States Court of Appeals for the Ninth Circuit by the Brotherhood of Locomotive Engineers, dated 10/21/92.

(9) Letter from S. Mark Lindsey, FRA Chief Counsel, to Robert W. Blanchette, Vice President-Law and General Counsel of the Association of American Railroads

(AAR), providing notice of the Ninth Circuit's decision and asking the AAR's cooperation in making known to its member railroads FRA's intention to enforce the court's decision nationwide beginning 1/1/93, dated 10/28/92.

(10) Letter from S. Mark Lindsey, FRA Chief Counsel, to Lawrence M. Mann, Alper & Mann, stating FRA's intention to enforce the Ninth Circuit's decision nationwide beginning 1/1/93, dated 10/28/92.

(11) Order by Circuit Judges Schroeder, Reinhardt, and Kleinfeld (with Judge Kleinfeld dissenting), United States Court of Appeals for the Ninth Circuit, granting the plaintiff's motion for attorneys' fees, dated 11/23/92.

(12) Operating Practices Bulletin No. 92-05, entitled "'Hypothetical Examples for the 'On-Duty Time' decision [sic] of the United States Court of Appeals for the Ninth Circuit," dated 12/2/92.

(13) "Supplemental Memorandum In Support Of Plaintiff's Motion For Attorneys Fees," filed in the United States District Court for the District of Oregon by the Brotherhood of Locomotive Engineers, dated 12/3/92.

(14) "Findings and Recommendation" by United States Magistrate Judge Juba, United States District Court for the District of Oregon, granting in part and denying in part plaintiff's motion for attorneys' fees, dated 12/15/92.

(15) "Request For Clarification Of Findings and Recommendation," filed by the Brotherhood of Locomotive Engineers, in the United States District Court for the District of Oregon, dated 12/22/92.

(16) Order by United States Magistrate Judge Juba, United States District Court for the District of Oregon, granting plaintiff's request for clarification, dated 1/6/93.

(17) Supplemental Judgment awarding plaintiff attorneys' fees in the amount of $22,216.14, United States District Court for the District of Oregon, dated 3/25/93.

(18) Petition for Interpretation of the Hours of Service Act by The Atchison, Topeka and Santa Fe Railway Company; Burlington Northern Railroad Company; Consolidated Rail Corporation; CSX Transportation, Inc.; Illinois Central Railroad Company; Norfolk Southern Railway Company; Norfolk and Western Railway Company; Southern Pacific Transportation Company; and Union Pacific Railroad Company to FRA, dated 3/26/93.

(19) Statement of agency policy and interpretation, entitled "Nationwide Applicability of a Decision of the United States Court of Appeals for the Ninth Circuit Concerning an Agency Interpretation of the Hours of Service Act; Miscellaneous Hours of Service Act Issues," as published in 58 Fed. Reg. 18,163, dated 4/8/93.

(20) Letter from Thomas C. Dorsey, Vice President & General Counsel, The American Shore Line Railroad Association, to S. Mark Lindsey, Acting Federal Railroad Administrator, expressing support for the 3/26/93 Petition, dated 4/23/93.

(21) Supplement to 3/26/93 Petition, dated 5/19/93.

(22) Letter from Grady C. Cothen, Jr., Acting Federal Railroad Administrator, to Ronald M. Johnson and Mark V. Holden, Akin, Gump, Strauss, Hauer & Feld, L.P.P., denying relief requested by petitioners' in their Petition and Supplement, dated 7/1/93.

/s/ David H. Kasminoff
for PAT MCLAUGHLIN
Docket Clerk
Federal Railroad
Administration

[Certificate of Service Omitted in Printing]

(6)

No. 94-1592

FILED
AUG 3 1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether compulsory time spent waiting by a train crew for deadhead transportation is "on-duty time" under the Hours of Service Act.

LIST OF ALL PARTIES

The following parties appeared before the Court of Appeals:

Petitioners:

Brotherhood of Locomotive Engineers and
United Transportation Union

Respondents:

The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad Company,
Consolidated Rail Corporation,
CSX Transportation, Inc.,
Illinois Central Railroad Company,
Norfolk Southern Railway Company,
Norfolk & Western Railway Company,
Southern Pacific Transportation Company,
and Union Pacific Railroad Company.

and

Federico Peña, Secretary of Transportation,
Department of Transportation,
S. Mark Lindsey, Acting Administrator,
and Federal Railroad Administration

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IN THE
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BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION,
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v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
and
FEDERICO PENA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The ruling at issue here, of the United States Court of Appeals for the Seventh Circuit, *en banc* is reported at 44 F.3d 437 and attached to Pet. Appendix 1a-20a. The ruling of the panel for the Seventh Circuit, originally affirming the decision of the Federal Railroad Administration is reported at 28 F.3d 324 attached to Pet. Appendix 21a-28a.

JURISDICTION

The *en banc* decision of the United States Court of Appeals for the Seventh Circuit reversing the ruling of the three judge panel was entered on December 29, 1994. The petition for writ of certiorari was filed on March 28, 1995, and was granted on June 19, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Hours of Service Act (hereinafter "HSA" or "Act"), provides in pertinent part:

> § 21103. Limitations on duty hours of train employees
>
> (a) GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—
>
> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.
>
> (b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:
>
> (1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.
>
> (2) Time the employee is engaged in or connected with the movement of a train is time on duty.
>
> (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

> (4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in a deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.
>
> (5) An interim period available for rest at a place other than a designated terminal is time on duty.
>
> (6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.
>
> (7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:
>
> (A) a casualty.
>
> (B) a track obstruction.
>
> (C) an act of God.
>
> (D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee left the designated terminal.
>
> * * * *

49 U.S.C. § 21103.[1]

---

[1] Formerly contained in 45 U.S.C. § 61(b) and 62(b). Effective July 6, 1994, Congress codified most of the transportation laws into Title 49 of the U.S. Code, the Hours of Service Act being one of those statutes. In the codification Congress stated that the new sections may not be construed as making a substantive change in the laws replaced, nor impair the precedential value of earlier judicial decisions and other interpretations. See H.R. Rep. No. 180, 103rd Cong., 2d Sess. 5 (1993).

STATEMENT OF THE CASE

The genesis of this litigation arose in 1990 when the affected engineers and trainmen brought suits in the district courts of Oregon and the Northern District of California. On July 29, 1991, the Oregon district court granted summary judgment in favor of the BLE and determined that there was:

> . . . no basis for concluding . . . that Congress intended to overturn prior judicial holdings that time spent waiting constitutes time on duty. Rather, I find that Congress intended time spent waiting for deadhead transportation to fall within the general statutory definition of time on duty which commences when an employee reports for duty and terminates when the employee is finally released from duty.

Brotherhood of Locomotive Engineers v. Skinner, No. 90-0051, slip op. at 7 (D. Ore. July 29, 1991) (Unpublished Opinion) (App. 6a).[2] The UTU case in California was dismissed on procedural grounds. Both cases were appealed and decided by the Ninth Circuit in the same opinion. *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992).

The Ninth Circuit, in a unanimous decision, held that the HSA was violated by requiring a crew to stay on a train awaiting deadhead transportation. It held:

> In conclusion, we note once again that waiting time has been considered time on duty throughout the eighty-five year history of the HSA. The FRA's position that this understanding was changed by the 1969 proviso regarding deadhead time finds no support in the statutory language, in the legislative history of the 1969 amendments, or in the policies underlying the statute, and is contrary to reason. Accordingly, we reject it.

975 F.2d at 1428.

---

[2] "App." refers to the appendix attached to this Brief.

Subsequently, the FRA on October 28, 1992 concluded that the Ninth Circuit's interpretation of the HSA was reasonable, and on January 1, 1993 attempted to apply the Ninth Circuit interpretation nationwide. After several petitions to the Federal Railroad Administration (hereinafter "FRA") to reconsider its decision, various railroads appealed to the Seventh Circuit. In fact three petitions for review were filed with the Seventh Circuit on this same issue.

The initial decision by a panel of the Seventh Circuit held that the decision of the FRA to apply the Ninth Circuit's decision nationwide was reasonable and affirmed the FRA's determination. On petition for Rehearing and Suggestion of Rehearing *En Banc,* the Seventh Circuit's *en banc* panel granted the railroads' petitions and vacated the FRA's orders.

On March 1, 1995 the FRA sent a letter to the Vice President-Law and General Counsel of the Association of American Railroads informing him that FRA would apply the Seventh Circuit decision in every locale but in those states comprising the Ninth Circuit. (App. 8a).

The HSA limits the hours of work of railroad employees engaged in duties related to train operations and mandates certain off-duty periods. 49 U.S.C.§§ 21101-21107. It limits to twelve hours the number of consecutive hours an employee can remain *on duty.* 49 U.S.C. § 21103(a)(1). The HSA also requires that a crew member be allowed ten hours *off-duty* before going back *on-duty* when that employee has worked the twelve hour statutory maximum. 49 U.S.C. § 21103(a)(2). Furthermore, it mandates that before an employee may be placed back on-duty, he/she must have received at least 8 hours off-duty during the preceding twenty-four hours. *Id.*

The issue to be resolved in this litigation arises in the common situation when railroad crew members, after working a 12 hour tour of duty, are instructed to stop their train and remain at the site until a new crew relieves them. During that period of time commonly known as

waiting time, crew members typically are still responsible to their employers for the safety of their train. Both the railroads and the FRA in the court below mischaracterized the issue of *waiting time* as a situation where crew members are *relieved from any further operating responsibilities.*[3] There exist numerous fact patterns, but normally the crew is not free to leave the train, and continues to be subject to further orders from the railroad.[4] While awaiting arrival of another crew, the employees are required to protect the train against vandalism, assure that the brakes remain properly applied to prevent undesired movement, observe passing trains for defects, and to promptly inform the railroad of any problems noticed. If the crew left the train without permission, it could be disciplined and possibly fired. If the train was vandalized and the crew did not attempt to protect it, the employees would be subject to discipline. If the brakes released and caused an undesired movement, the crew could be disciplined, particularly if an accident occurred as a result. If the crew observed an obvious defect on a passing train, and did not inform the railroad promptly, the crew might be disciplined. (See affidavit of R. E .Futrell, App. 15a).[5]

---

[3] It is to be noted that the crews are paid for the entire period of time waiting for deadhead transportation.

[4] The FRA in its Ninth Circuit brief admitted that "During this time [i.e. awaiting the deadhead vehicle] the employee is not, we acknowledge, free to come and go as he pleases." (Brief for appellants in Ninth Circuit at 14).

[5] The affidavits referred to herein were part of the record in the Ninth Circuit. Because the Seventh Circuit case did not allow for an additional underlying factual administrative record to be established (other than the petition by the railroads), these affidavits were submitted in the Seventh Circuit briefs by Petitioners here. Additionally, in the railroads' petition to the FRA, that gave rise to the Seventh Circuit case, they attempted to refute the affidavit of Mr. Futrell, which was part of the Ninth Circuit record. The pertinent facts to be considered in reviewing the Seventh Circuit and Ninth Circuit decisions are the same.

The railroads, in opposition to the petition for certiorari, questioned the appropriateness of petitioner citing certain materials other than what was specifically contained in the administrative record. As we understand practice before this Court:

> If counsel wishes to call the Court's attention to something outside the record, as judicially noticeable or otherwise relevant, the brief should fairly disclose the status of such material. If appropriate, portions may be quoted in the text of the brief itself, or the entire document may be reproduced in an appendix bound with the brief. But it should not be included in the separate Rule 26 joint appendix, which should contain only the significant portions of the certified record.

R.L. Stern, E. Gressman, S. M. Shapiro, *Supreme Court Practice*, 520 (Seventh Ed. 1993). Most of the factual materials cited are publications from government agencies and judicially noticeable. We submit that the remaining articles and railroad rules also are relevant to the Court's determination.

The complaints of employees show that crews are frequently compelled to wait for relief crews several hours after expiration of the 12 hour on-duty limit, and sometimes even up to 10 hours longer. (See affidavits of C. E. Anderson, App. 17a-18a, R. E. Futrell, App. 15a, and J. U. Chrisman, App. 22a). One of the safety hazards involved is not counting the above period as on-duty time is that employees are constantly faced with irregular work hours as well as irregular sleep patterns. Extension of the crew members' work day through protracted periods of time spent waiting for deadhead transportation contributes to employee fatigue. This has been shown to be a significant factor in the safety of rail operations. (See *Issues in Locomotive Crew Management and Scheduling*, U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 (February, 1991). (App. 25a).

In order to rectify this problem, all that a railroad needs to do is to plan in advance to have a crew ready to relieve the crew on the train, and to have transportation waiting to take the crew to the point of final release. A railroad in most cases has advance notice by following the train movements, and thereby knows whether the crew on the

train will reach the 12 hour limit. Typical railroad rules require a crew to give sufficient advance notice when it becomes apparent that it will not complete the trip within the lawful period. For example after being on duty 10 hours, a crew is required to notify the train dispatcher the time when it will have been on duty 12 hours. Also, the crew informs the dispatcher in advance when and where the 12 hours are likely to expire.

SUMMARY OF ARGUMENT

A. There are four specific provisions of the HSA which support the conclusion that all compulsory time spent waiting for deadhead transportation is time on duty. As shown below, this period of time is time on duty whether or not the employees are free of all operating responsibilities.

1. 49 U.S.C. § 21103(b)(5) provides that an interim period available for rest at a place other than a designated terminal is time on duty. Therefore, even though a crew member is free from all operating responsibilities, when he/she is relieved at other than the designated terminal, this is counted as time on duty.

2. The HSA delineates what shall be excluded from the definition of time on duty. These are time spent in deadhead transportation, and waiting time that occurs as a result of an act of God or major unforeseen equipment failure (and then only if the unforeseen problem occurs at a location with suitable facilities for room and board for the affected crew). 49 U.S.C. § 21103(b)(7). It is significant that Congress did not place waiting time for deadhead transportation as one of the exclusions.

3. 49 U.S.C. § 21103(b)(3) states that in determining time on duty, there shall be counted, in addition to the time such employees actually are engaged in or connected with the movement of any train, all time on duty

in other service. Therefore, if an employee is not free to go as he/she chooses after the end of 12 hours, then this is other service for the carrier and is time on duty under the HSA.

4. 49 U.S.C. § 21103(b)(1) states that time on duty ends at the time the employee is *finally released from duty*. Therefore, time on duty continues until the employee reaches his/her designated terminal. It is undisputed that the employees are not finally released from duty while waiting for deadhead transportation, but are only relieved from duty. There are other paperwork functions required of the crew when it reaches the designated terminal, and that is the time that the employee is finally released.

5. The Seventh Circuit failed to recognize that the statute does not require an employee to be actually engaged in operational activities to be considered on duty under the HSA. See §§ 21103(b)(5) and (b)(3). Only one of seven subsections of the Act deals directly with the time that an employee is actually engaged in or connected with the movement of a train.

B. It is undisputed that the HSA is intended to promote safety by preventing mental and physical strain associated with remaining to long at an exacting task. As a remedial statute, the HSA is entitled to liberal construction to serve the humane purposes for which it was adopted.

The Seventh Circuit decision is contrary to the legislative history and the Congressional intent. See H.R. Rep. No. 7641, 59th Cong., 2d Sess. (1907); S. Rep. No. 604, 91st Cong., 1st Sess., Reprinted in 1969 U.S. Code Cong. and Adm. News 1636, 1639; *Hearings on H.R. 8449, H.R. 84, and H.R. 9515, Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 29-30, 35, 99-100, 135, 199 (1969)

(Hereinafter *1969 Hearings*); 116 Cong. Rec. H 29,322 (daily ed. Oct. 9, 1969).

The Court should not give deference to the FRA's interpretation of the HSA for a number of reasons:

1. The FRA has previously determined that the time during which a crew is required to remain with a train is time on duty.

2. The FRA has been criticized by the U.S. General Accounting Office, the National Transportation Safety Board, and the Congress for not properly enforcing the railroad safety laws.

3. The FRA has been heavily influenced by the Association of American Railroads in its decision making.

4. The HSA, unlike under all other Federal railroad safety statutes, does not provide the FRA with authority to promulgate regulations.

C. This Court held in interpreting the HSA, that as long as employees are liable to be called upon at any moment and are not at liberty to go away, they are on-duty whether inactive or not.

> They were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on-duty when inactive. Their duty was to stand and wait.

Missouri, Kansas and Texas Railway Company v. United States, 231 U.S. 112, 119 (1913).

United States v. Pennsylvania R.R., 275 F.Supp. 345 (*W.D.Pa. 1967*) is a case brought by the FRA where it sought fines for violation of the HSA because of a crew waiting for deadhead transportation. The court held that if the employee's time is not his own and is being consumed on behalf of the employer at its direction for its presumed benefit, it is time on duty be it activity or relaxation. See also *United Transportation Union v. Skinner, supra*, 975 F.2d at 1426; *United States v. Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917); *Northern Pacific Ry. Co. v. United States*, 220 F. 108, 110 (9th Cir. 1915); *San Pedro, L.A. & S.L. RR. Co. v. United States*, 213 F. 326, 328 (8th Cir. 1914); *United States v. Northern Pacific Ry. Co.*, No. 2635, (W.D. Wash., Feb. 13, 1914) (Unpublished Decision); *U.S. v. Chicago, M. St., P.P., R.R.*, 195 F. 783 (D.C. Wash. 1912).

The Seventh Circuit is the only court that has ever held that time waiting for deadhead transportation should be considered as not time on duty.

Most railroads require crews who are *relieved from duty* to have further responsibilities. As previously discussed, to be *on duty* under the HSA, it is not necessary to be engaged in any operational activities. 49 U.S.C. § 21103(b)(5) and (b)(3). Nevertheless, the operating rules of most railroads in the country require crews who are *relieved* from duty still to have certain responsibilities and duties. The only court in which a full factual record was established is the Oregon district court, where it found that the employee is not free to leave the train and must protect the train from vandalism and undesired movement.

The Seventh Circuit placed significance in the fact that the crew waiting for deadhead transportation would not be operating the train again until he/she receives the required rest under the Act. That limited observation neglects the obvious and common situation in that the worker will not receive rest at usual times, and results in irregularity of work shifts. Experts have concluded that work systems which result in shifts of unusual length and unpredictable work hours, such as a presently employed in the railway industry, place workers and the general public at risk by creating a situation in which the workers ultimately become victims of chronic sleep deprivation. Crew member fatigue has been placed on the NTSB's most wanted list of safety issues in the rail-

road industry, and the Board has found in various accidents that work/rest issues have been critical factors in the cause of accidents.

The FRA, in several studies on the issues related to irregular work hours, excessive work hours, and waiting time has found that sleep records of engineers were irregular and atypical when compared to non-engineers and that the 8 hours off duty after the employee is finally released at the designated terminal seldom translates into more than 4 hours sleep because of the time required to get to a motel and eat, coupled with the fact that sleep will be interrupted by a telephone call 2 hours before the next job starts.

In a study in FRA's Region 2, among the several safety sensitive issues identified were that operating crews may work up to 112 hours in any 7 day week and that 80 to 90 hours work weeks are not extraordinary. The routine of an 8 hour off-duty period in which workers must travel home, eat, bathe, sleep and return to their reporting point may continue for an indefinite number of days without the worker having the legitimate opportunity to have a day off work.

FRA's latest position on this issue pointed out the safety hazards associated with irregular work hours and lack of rest in stating that to the extent that waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of the fatigue on safety-sensitive performance indicates that the waiting periods could contribute to cumulative exhaustion of the employee. (App. 11a-12a).

For all of the above reasons, the decision of the Seventh Circuit should be reversed.

ARGUMENT

I. THE HSA, ITS LEGISLATIVE HISTORY, AND THE ACT'S REMEDIAL PURPOSE ALL SUPPORT THE CONCLUSION THAT COMPULSORY TIME SPENT BY RAILROAD EMPLOYEES WAITING FOR DEADHEAD TRANSPORTATION IS TIME ON DUTY.

A review of the statutory language of the HSA, the interpretation of that language by the Court throughout the Act's 88-year history, the legislative history to the 1969 amendments to the Act, and consideration of the Act's remedial purpose, all support the conclusion that compulsory time spent by railroad employees waiting for deadhead transportation to their point of final release is time on-duty under the HSA.

A. Compulsory Waiting Time Being Time on Duty Is Supported By The Plain Meaning Of The Act.

The provisions of the HSA defining what rules are to apply in determining *time on duty* support the conclusion that all compulsory time spent waiting for deadhead transportation is time on-duty. This is true whether crew members are compelled to oversee their train or not.

It is important to recognize that the HSA encompasses every type of activity or inactivity of a railroad worker—time on duty, time off duty and time spent in deadhead transportation. Congress contemplated every possible period of time between the employee reporting to duty until he/she is *finally* released from duty, and determined that even certain periods when a crew is actually resting at locations other than a designated terminal without any duties whatsoever to perform is time on duty.

There are four provisions of the HSA, discussed below, which lead to this result.

1. The HSA expressly addresses the treatment of *rest periods* at locations other than a designated terminal.

The Act provides that an interim period available for rest at a place other than a designated terminal is time on duty. 49 U.S.C. § 21103(b)(5). Assuming *arguendo* that the railroads' assertion is correct—that crew members are free of all operating responsibilities during the time spent waiting for deadhead transportation—it is clear from the language of § 21103(b)(5) that all waiting time at other than a designated terminal shall be considered time on-duty. If an employee is relieved at other than his/her designated terminal, this is counted as time on duty.

The respondents have attempted to divert attention from the underlying safety issues in this litigation. The railroads' examples of employees being allowed to leave the train and wait at a facility where food is available are rare and definitely not factual. First, crews normally are not allowed to leave a train unprotected. At least one crew member guards the exposed cargo and equipment against vandalism. Second, even assuming *arguendo* that the entire crew was permitted to leave the train, as stated above, Congress still has determined that this is time on-duty.

2. The HSA also delineates what shall be excluded from the definition of time on-duty. The first exclusion from the definition of time on-duty is all time spent in *deadhead transportation* from duty to an employee's point of final release. 49 U.S.C. § 21103(b)(4).

The second exclusion from the definition of time on-duty is all waiting time that occurs as a result of an act of God or major unforeseen equipment failure, and then only if the unforeseen problem occurs at a location with suitable facilities for room and board for the affected crew members. 49 U.S.C. § 21103(b)(7).

The above two exceptions to the definition of time on-duty also support the interpretation that compulsory waiting time is time on-duty. Congress specifically considered

what shall be excluded from the definition of time on-duty, and time waiting for deadhead transportation does not fall within either exception to the definition of time on-duty. The fact that waiting time was not excluded from the definition of time on-duty, except in a narrow context, supports the point that Congress considered this time to be on-duty time.

3. The HSA also contemplates the most common form of waiting time—the situation where crew members are relieved from active operations of the train, yet are still responsible for the safe keeping of the train. In determining time on duty, there shall be counted, in addition to the time such employee is actually engaged in or connected with the movement of any train, all time on duty *in other service* performed for the common carrier during the twenty-four-hour period involved. 49 U.S.C. § 21103(b)(3).

This provision, read in conjunction with the above specified exceptions to the definition of time on-duty, further shows that Congress intended all such waiting time to be on-duty time. Crew members are *in other service* when they are waiting to deadhead back to the point of final release, yet still responsible to the carrier for the safe keeping of the train. As long as the employee is subject to orders of the employer, he/she should be considered "in other service" and thus, *on-duty*.

4. The Act defines time on-duty as ending at the time the employee is *finally released from duty*. 49 U.S.C. § 21103(b)(1). Therefore, time on duty continues until the employee reaches his or her designated terminal, unless the Act provides otherwise. Apparently, respondents contend, that while crew members are awaiting another crew to relieve them, it is not time on-duty because the employee is *relieved* (even though not finally *released*). Such rationale is not accurate by a simple reading of the

language of the statute. Also, as the U.S. District Court for the District of Oregon reasoned:

> . . . to hold otherwise would defeat Congress' intent and result in the anomalous situation whereby an employee would be *on duty* if the period were available for rest but *off duty* where the employee, under the direction and control of the railroad, is waiting for transportation to his or her final point of release.

Brotherhood of Locomotive Engineers v. Skinner, supra, slip op. at 8 (App. at 6a-7a).

5. The Seventh Circuit stated that *the* Act *does not specifically address how time spent by an outlawed crew waiting for deadhead transportation must be categorized.* 44 F.3d at 440. That statement is misleading. While Congress did not specifically use the term *waiting for deadhead transportation* in the HSA, it certainly addressed the issue by the general all inclusive provisions of the Act. For example, interim periods available for rest at other than a designated terminal is time on duty 49 U.S.C. § 21103(b)(5); the compulsory waiting time is not excluded from the definition of time on duty. See 49 U.S.C. § 21103(b)(4) and (7); waiting time may be considered duty *in other service* and therefore on duty time. See 49 U.S.C. § 21103(b)(3); and lastly, a crew remains on duty (unless specifically excluded by the statute) until *finally released from duty* at the designated terminal (not merely *relieved* at some other location). 49 U.S.C. § 21103(b)(1). Congress in 1969 intended to, and did, close all loopholes that previously existed in the HSA. Furthermore, there are a multitude of situations to which a crew may be subjected in a particular tour of duty. It would be impossible to spell each one out legislatively. Rather, general language covering all conceivable types of conditions prevent loopholes from occurring. The railroads, with the assistance of FRA, are attempting to carve out a loophole in the safety statute that doesn't exist and was not intended by Congress.

The Seventh Circuit at 44 F.3d at 443 attempts to support its rationale that waiting time is time-on-duty by referring to three sections in the statute:

a. Section [21101(5)] states that the Act applies only to employees *actually engaged in or connected with the movement of any train* . . .

b. According to Section [21103(b)(1)] of the statute, time-on-duty commences when a crew reports for duty and terminates when a crew is finally released from duty, and

c. Section [21103(b)(3)] specifically states that time on duty is comprised of *time an employee is actually engaged in or connected with the movement of any train.*

Only one subsection of the operative section of the Act, § 21103(b)(2), deals directly with time an employee is actually engaged in or connected with the movement of a train. The remaining six subsections account for other periods of time that Congress required to be considered in determining what is time on or off duty. All words and provisions of statutes are intended to have meaning and are to be given effect, and words of a statute are not to be construed as surplussage. See *Bruce Babbitt, et al. v. Sweet Home Chapter Of Communities For A Great Oregon, et. al.*, 63 U.S.L.W. 4665, 4668 (U.S. June 27, 1995); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Hoffman v. Connecticut Dept. of Income Maintainance*, 492 U.S. 96, 103 (1989); *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Administrator, Federal Aviation Administration, et al. v. Robertson, et al.*, 422 U.S. 255, 261 (1975); *Wilderness Society v. Morton*, 479 F.2d 842, 856 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

The Seventh Circuit did not take into consideration several factors. First, an employee who is provided an

interim period of rest at other than a designated terminal is not actually engaged in or connected with the movement of any train, and this is time on duty under Act. The employee is not finally released from duty until he/she actually arrives at the designated terminal (after any deadhead transportation). Also, it is not necessary to be performing any operational service covered by the HSA to be counted as time on duty.

B. The Seventh Circuit's Interpretation Is Contrary To The Legislative History.

The HSA was originally enacted in 1907 to promote safety in the operation of trains by preventing mental and physical strain associated with remaining too long at an exacting task. *Atchison, Topeka & Santa Fe Railroad v. United States*, 269 U.S. 266 (1925); *Chicago & Alton Railroad v. United States*, 247 U.S. 197, 199 (1918). As a remedial statute, the HSA is entitled to liberal construction to serve the humane purposes for which it was adopted. *See Atchison, Topeka & Santa Fe Railroad v. United States*, 244 U.S. 336, 343 (1917).

The House Committee on Interstate and Foreign Commerce, quoting the President of the United States stated:

> The strain, both mental and physical, upon those who are engaged in the movement and operation of railroad trains under modern conditions is perhaps greater than that which exists in any other industry, and if there are any reasons for limiting by law the hours of labor in any employment, they certainly apply with peculiar force to the employment of those upon whose vigilance and alertness in the performance of their duties the safety of all who travel by rail depends.

See H.R. Rep. No. 7641, 59th Cong., 2d Sess. 3 (1907).

The HSA remained largely unchanged until it was amended December 26, 1969. The 1969 amendments to the HSA demonstrate Congress' concern with exactly what

constituted *time off-duty* and *time on duty*. Originally, all time within the twenty-four hour period was considered either *on* or *off* duty, with deadheading time both to and from service generally being *off duty* time. This resulted in flagrant abuses which thwarted the entire purpose of the statute.

> This has resulted in an employee, believe it or not, being assigned to ride 8 hours in deadhead service and not have this time count as time on duty, and then follow it immediately with his official tour of duty, which could run anywhere from 8 to 16 hours, making his total time in railroad service a potential of 24 hours divided between deadheading and non deadheading time.

116 Cong. Rec. H29,322 (daily ed. Oct. 9, 1969) (Statement of Representative Olsen).

The 1969 amendments changed time on-duty (used in computing the maximum 12 hour workday) to include the time that is provided for rest in places other than the designated terminal, time provided for rest of less than 4 hours at a designated terminal, and time spent by employees going to an assignment or traveling between assignments. Time off-duty is also defined, and time spent in deadheading back from a duty assignment is not considered time off-duty. *Id.* at H29,318 (Statement by Representative Staggers). These changes were designed to prevent abuses by ensuring that off-duty time is time of *undisturbed rest* and time on-duty includes time of deadheading to and between service. *Id.* at H29,322. (Statement of Representative Olsen). These clarifications were designed to limit the time required in traveling to duty and to get the employees to designated terminals as quickly as possible after duty.

The legislative history unmistakably supports the conclusion that the time in question is time on-duty and that the Seventh Circuit interpretation is wrong. This very issue was raised in the Hearings on the 1969 amendments to the Hours of Service Act. (*See* 1969 *Hearings*

at 29-30 (1969). In testimony by Al H. Chesser, who represented all of rail labor,[6] he discussed the problems in the old law where employees were *relieved* from duty, but required to remain on the train. (*1969 Hearings* at 30, 99-100). The problem raised by Mr. Chesser was dealt with specifically by Congress in 1969 by requiring that any release time en route for rest at other than a designated terminal is time on-duty. (*See* 49 U.S.C. § 21103(b)(5)). The Seventh Circuit relies on testimony at congressional hearings to the effect that waiting time was never treated as on duty time. 44 F.3d at 444. Simply stated, the Seventh Circuit is wrong. (See *Infra* (16-17, 19). What the Seventh Circuit also fails to acknowledge is that Congress closed any loopholes in 1969. The railroad representatives testified as to their understanding in 1969. In the 1969 *Hearings*, the Association of American Railroads' ("AAR") spokesman, Mr. R.R. Manion, Vice President of the AAR, makes the point absolutely clear. At page 135 of the 1969 Hearings, Mr. Manion testified:

> However, under another provision of H.R. 8449—section 1(b)(3)(A)—periods available for rest "at other than a designated terminal" will be included as time on duty. Consequently, if a crew reaches the hours of service limit in the country and is relieved there, it will still be on duty for hours-of-service purposes because it is not relieved at a designated terminal. In this situation, the railroad will be obliged to violate the law, whatever it does, which, of course, is an absurd result.

[6] The railroads in the Seventh Circuit mistakenly stated that Charles Coughlin was the main union witness for rail labor. See *1969 Hearing* at 7 and *Hearings on S.1938 Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce*, 91st Cong., 1st Sess. 14 (1969). Also, Mr. Coughlin's statements about his understanding of waiting time are clearly refuted by the overwhelming legislative history, case law, and the statements by the railroads representatives—the Association of American Railroads.

Section 1(b)(3)(A) of H.R. 8449 was not changed as urged above by the AAR. Therefore, as stated by the AAR *if a crew reaches the hours of service limit in the country and is relieved there, it will still be on-duty for hours-of-service purposes because it is not relieved at a designated terminal.* (1969 *Hearings* at 135). The very same concern was voiced by the Penn Central Railroad's officials in the 1969 Hearings.

> *In the few cases where it is necessary, because of unusual and unforeseen circumstances, to relieve a crew short of its final terminal . . . I do not see how it is possible under the proposed legislation.* (1969 Hearings at 199).

Congress only allowed the deadhead transportation (i.e. travel time) to the designated terminal to be neither time on-duty nor off-duty.[7]

The Senate Report on the 1969 amendments, adds further support that the time spent by crews on locomotives after the expiration of 11 hours 59 minutes is still on duty.

> Inherent in the calculation of whether an employee is on duty is that of whether the interim periods provided for his rest are such, and at such places as to provide the employee with the proper opportunities and facilities for rest and relaxation from the duties of his occupation. Decisions of the courts have not established a minimum period of release which would constitute a bona fide break in continuity of service in all cases and all circumstances.

S. Rep. No. 604, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Adm. News 1636, 1639. After re-

[7] The only other exception to being on duty time is pursuant to 49 U.S.C. § 21103(b)(7), where there is an act of God, track obstruction, casualty, derailment, or major disabling equipment failure, and that only if the place is where the suitable facilities for food and lodging are available. None of the facts, as relevant here, make the exception applicable.

viewing this legislative history, the Ninth Circuit concluded that:

> Nowhere in the legislative history is it suggested that Congress intended to convert time previously considered time on duty to time off duty, or to weaken the protections afforded the employees and the safety interests that underlie the HSA. Every indication is that the purpose of the amendments was precisely the opposite—to strengthen those rights and interests.

United Transportation Union v. Skinner, supra 975 F.2d at 1428.

Despite respondents representations to the contrary, historically, waiting time has been construed as time on duty. As the Ninth Circuit stated:

> Prior to the enactment of the 1969 amendments, the agency charged with interpreting the HSA (first the Interstate Commerce Commission and then the FRA) consistently construed the phrase "time on duty" to include time spent by railroad employees waiting on stopped trains for the arrival of relief crews or spare parts, on the ground that those employees remained subject to orders issued by the railroad and were not free to leave their posts.

975 F.2d at 1426.

The Seventh Circuit stated that since 1907 the Act had never been construed to require time spent waiting for deadhead transportation as time on duty. 44 F.3d at 440. First of all, that conclusion is not accurate. See e.g., *1969 House Hearings at 35*; Affidavit of J. U. Chrisman, App. at 22a-23a, and affidavit of R. E. Futrell, App. at 14a. Furthermore, the Seventh Circuit didn't acknowledge that FRA in 1966 sought fines in federal court in Pennsylvania for violations of the HSA because of a crew waiting for deadhead transportation. See *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967). The Government's position was that time spent waiting for deadhead transportation by a crew, which had reached its maximum hours of service and been relieved from duty

while still on the train, was on duty time for purposes of the HSA. The court held that time waiting for deadhead transportation was time on duty. Included as part of the hearings record in 1969 was FRA's prior policy statement regarding its interpretation of the law. It does not specifically mention waiting time. However, it made clear that an employee *remains on duty until relieved of all responsibilities and is free to go and do as he pleases. (1969 Hearings at 35).* An employee waiting for deadhead transportation is not relieved of all responsibilities. That does not occur until the employee arrives at the designated terminal and is *finally released* from duty.

Since the adoption of the 1969 amendments, it is debatable what FRA's interpretation has been. As shown by FRA's own senior management personnel (See affidavits of J. U. Chrisman (App. 20a) and R. E. Futtrell (App. 13a)) they considered waiting time as time on duty. FRA refutes those affidavits. Lack of clarity of FRA policy has been a long time problem, and continues to date. In a Focus Group Report dated May 1995, which was prepared for the FRA, responses from FRA's field and regional personnel to various issues were outlined. The lack of consistency in different regions was highlighted. Among the top concerns were that:

- Each of the regions do things differently. There needs to be consistency and standardization between the regions.
- Interpretations vary from inspector to inspector. Make sure everyone is doing the same thing in interpretations.
- Railroads shop around for the answers they want because they get different interpretations.

Focus Group Report at 11 (App. 55a).

FRA's credibility in this litigation leaves a lot to be desired. It has waffled since this dispute arose in 1990. Both the Seventh and the Ninth Circuits refused to give deference to FRA's interpretation of the HSA for differ-

ent reasons. We agree with both courts' conclusions, but for different reasons. FRA should be given little deference in any event because, unlike under all other Federal railroad safety statutes, Congress under HSA has not granted to FRA statutory authority to promulgate regulations. It should be recognized that FRA has been criticized over the years for not properly enforcing the safety laws, and has been heavily influenced by the Association of American Railroads.[8] The FRA has been subject to unprecedented criticism of its safety enforcement program, not only from the public, but from Congress, and government agencies, such as the U.S. General Accounting Office and the National Transportation Safety Board. The GAO has issued 6 such condemning reports within recent years. *See e.g., Railroad Safety: New Approach Needed For Effective FRA Safety Inspection Program*, U.S. General Accounting Office/RECD-90-194 (July 1990); *Railroad Safety: Weaknesses Exist in FRA's Enforcement Program*, U.S. General Accounting Office/RCED-91-72. (March 22, 1991). See also, National *Transportation Safety Board Railroad Accident Report Head-On Collision Between Iowa Interstate Railroad Extra 470 West and Extra 406 East With Release of Hazardous Materials Near Altoona, Iowa* (July 30, 1988), NTSB/RAR-89/04 (July 6, 1989); *National Transportation Safety Board Hazardous Materials Accident Report, Hazardous Materials Release Following the derailment of Baltimore and Ohio Railroad Company Train No. SLFR, Miamisburg, Ohio* (July 8, 1986), NTSB/HZM-87/01 (September 29, 1987), all of which are critical of FRA's enforcement activities.

In its 1991 Report, the GAO examined the adequacy of FRA's enforcement program and concluded that the

[8] It is worth noting that Robert A. Blanchette, a former Administrator of FRA, is currently the Vice President and General Counsel of the Association of American Railroads. Also, on June 27, 1995, in an article in the Washington Post at p. C9, columnist Coleman McCarthy, said "The FRA, with a record of being as cozy as club car poker partners with the railroads. . ."

program *is not effective in ensuring that the nation's railroads comply with Federal Safety regulations.* While the specific aspects of each railroad safety law were not examined separately in the report, it further demonstrates that FRA's interpretation of the HSA should be given little deference by this Court.

C. The Seventh Circuit's Interpretation Is Inconsistent With Case Law.

The Respondents' interpretation is inconsistent with case law precedent. In 1913 the Court held that as long as employees are liable to be called upon at any moment and not at liberty to go away, they are on-duty whether inactive or not.

> . . . they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait.

Missouri, Kansas, & Texas Railway Company v. United States, 231 U.S. 112, 119 (1913).

Two years prior to the 1969 amendments to HSA, in a decision concerning time waiting for deadhead transportation, a court distinguished between time on-duty and time off-duty by stating the obvious, that off-duty time is *free time*, time an employee is allotted for which he will not be disturbed from his own inclination, be it activity or relaxation. *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967). As long as an employee is subject to the orders of his employer, his time is not his own and is being consumed on behalf of the employer at its direction and for its presumed benefit. *Id.* at 348. (See further discussion of this case, *supra* at 17). Although the 1969 amendments did change the definition of time spent in deadhead transportation by an employee *returning* from duty to his point of final release (*i.e.* neither on nor off duty), it did not change the principle that time spent on the train subject to orders was not

deadhead time. *See also U.S. v. Chicago, M. S. P. & P., R.R.*, 195 F. 783 (D.C. Wash. 1912) where the court held that an employee was on duty when he is at his post in obedience to rules of his superiors, whether actively at work or awaiting orders. Some additional cases which dealt with this issue will further demonstrate that the employees are *on-duty* even after *relieved*.

In *United States v. Northern Pacific Ry. Co.*, No. 2635, W.D. Wash., Feb. 13, 1914, the court said:

> An employee goes on duty . . . He remains on duty while he is in charge of his train, performing service in and about the same, or held responsible for the performance of such service should the occasion therefore arise.
>
> An employee is not off duty until he is relieved from all responsibility as to his train and becomes his own free agent to go and do as he pleases.
>
> . . . .
>
> After an employee in train service starts on his trip he can not be said to be off duty, within the meaning of the law, until he reaches the end of his run, unless before reaching his destination he is released from all service in connection with his train, or from all responsibility therefor should the occasion arise. . . . (slip op. at 7).[9]

Similarly, in *Northern Pacific Ry. Co. v. United States*, 220 F. 108, 110 (9th Cir. 1914) the court stated:

> In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than 16 hours. But they were under orders liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait.

[9] The decision is not published.

Also, in *San Pedro, L.A. & S.L. RR. Co. v. United States*, 213 F. 326, 328 (8th Cir. 1914) the court pointed out that:

> The length of hours of service has a direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends . . . If, then, it be assumed, as it must be, that in furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power can not be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations.

In *United States v. Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917), the train crew was released, but was subject to change, and the men were required to hold themselves in readiness to respond to a call, and to be wtihin reach in case their services were needed. The court held that such time was time on duty. The same kind of responsibilities are imposed on crews who are released under the facts of the present litigation. Therefore, such time that employees are relieved from duty, but not finally released, should be held *on duty* time.

The Ninth Circuit in reviewing this case law reasoned:

> Without exception, the lower federal courts followed the Court's lead in holding that waiting time must be included in the calculation of an employee's time on duty in order to effectuate the purpose of the HSA. The basic principle underlying those decisions was that as long as a train crew 'remained the crew of the train,' whether or not 'temporarily relieved,' the crew members were not free to rest in the sense required by the statute (quoting *Northern Pac. Ry.*, 220 F. at 110).

United Transportation Union v. Skinner, supra 975 F.2d at 1426.

In its opinion, the Seventh Circuit discussed its understanding of the status of the case law prior to the 1969 amendments to the Act. 44 F.3d at 444. It disagreed with the analysis by the Ninth Circuit that prior cases held that crews were on duty during the time they spent waiting. The Seventh Circuit attempts to distinguish such cases by stating that those crews had further operational duties to perform. We submit its reasoning is flawed. First, the waiting time is either time-on-duty or not time-on-duty, irrespective of any further operational duties. Secondly, such rationale as dictated by the Seventh Circuit completely ignores the safety purposes of the Act, and the fact that a serious safety issue results from irregular work and sleep hours.

In sum, if Congress intended waiting time to be off-duty time, then they would have overruled the case law precedent at the time of the 1969 amendments to the HSA. Congress never did that, and we submit it intended this historical precedent to remain in force.

II. THE OPERATING RULES OF MOST RAILROADS REQUIRE CREWS WHO ARE "RELIEVED FROM DUTY" TO HAVE FURTHER RESPONSIBILITIES.

As previously discussed to be *on duty* under the HSA, it is not necessary to be engaged in any operational activities. 49 U.S.C. § 21103(b)(5) and (b)(3). Nevertheless, the operating rules of most railroads in the country require crews who are *relieved* from duty to still have certain responsibilities and duties. The only court in which a full factual record was established is the Oregon district court where it found that the employee is not free to leave the train and must protect the train from vandalism and undesired movement. (Slip Op. at 5, App. 4a).

Subjecting the employee to such responsibilities, though they may only require minimal physical activity, has the effect of extending service time beyond the maximum

twelve hour limit. There is no distinction under the HSA as to any particular duty or duties which an employee needs to perform to be considered *on-duty*. Also, while some of these responsibilities are not physically strenuous, they are important to the safe operation of the railroad system and, therefore, having them performed by fatigued employees poses a safety threat to both employees, as well as the public. The FRA has agreed that if an employee performs *passive* duties, that constitutes time on duty. Therefore, application of any one of these operating rules would dictate violations of the HSA even after the crew is allegedly *relieved* from duty.

The railroads contend that these requirements are not regularly imposed. Such statements fly in the face of the specific rules published by the railroads. For example, many railroads require that employees must observe passing trains closely for any defects or unsafe conditions. The petitioners submit such requirements as set out above are imposed at all times. Even if there were no obligations imposed on the crew and it was free to leave the train, the Act is still violated. Interim periods available for rest at other than a designated terminal is time on duty. 49 U.S.C. § 21103(b)(5). This period of time is *interim* because the employee is not finally released from duty. See 49 U.S.C. § 21103(b)(1). The employee is not finally released until he/she arrives at the designated terminal where the employee performs a few ministerial duties.

III. THERE EXISTS A SERIOUS SAFETY ISSUE WHICH IS DIRECTLY IMPACTED BY THE DECISION OF THE SEVENTH CIRCUIT.

There can be no justifiable disagreement that there exists a direct relationship between fatigue and accidents. *See e.g.* H.R. Rep. No. 91-469, 91st Cong., 1st Sess. 6 (1969). Stress in the workplace, resulting from long and irregular work hours, has long been a source of concern

for railway workers, and has recently come to the attention of society at large.

Accidents caused by human error have consistently been a significant portion of the total number of railroad accidents occuring in any given year. Approximately 80% of the railroad accidents investigated by the NTSB over the past 10 years are the result of human error. In the past five years railroad accidents caused by human error consistently have accounted for approximately one-third of all train accidents. Preliminary statistics for 1994 show that 34% of the accidents were caused by human error.

According to Dr. Charles Czeisler, then Director of Circadian and Sleep Disorders Medicine at Brigham and Women's Hospital in Boston, (New York Times, May 15, 1990 at pg. C8) *because their reaction time is affected . . . sleep deprived people may be more prone to making mistakes on the job.* Indeed, sleep researchers indicate that sleepiness is second only to drunkenness as a cause of automobile accidents. The Department of Transportation, in a report to Congress, stated that at least 40,000 traffic accidents a year may be sleep related, and that more than 20% of all drivers have fallen asleep at the wheel. *Id.*

In 1984, Michael K. Coplen, a locomotive engineer in Gillette, Wyoming published an article concerning the effect of sleep habits on shift workers in the Rocky Mountain News, May 21, 1984 at 39. Coplen referred to several industrial accidents (two train accidents and the Three-Mile Island incident) noting that in each case the accidents occurred between the hours of 3 a.m. and 5 a.m. which, according to several researchers, is the lowest point in our daily cycle of alertness. In addition, Coplen cited an analysis of a fatal crash of a United Airlines plane near Salt Lake City in 1977, where the author concluded that *fatigue caused by frequently changing shift work schedules . . . fostered a series of errors that compounded into a fatal crash.*

The Seventh Circuit placed significance in the fact that the crew waiting for deadhead transportation would not be operating the train again until he/she receives the required rest under the Act. 44 F.3d at 444. That limited observation neglects the obvious and common situation in that the worker will not receive rest at usual times and results in irregularity of work shifts.

In the testimony of Dr. Donald I. Tepas, who testified as an expert at the May 12, 1988 hearing by the National Transportation Safety Board regarding the fatal head-on collision of two Conrail trains at Thompsontown, Pennsylvania on January 14, 1988, he noted regularity of work shifts is indeed of great concern in the railroad industry. At the time, Dr. Tepas was a Professor of Psychology and Director of the graduate program in Industrial and Organizational Psychology at the University of Connecticut. Dr. Tepas also served as the U.S. representative on the Scientific Committee on Night and Shift Work of the International Commission on Occupational Health. According to Dr. Tepas, work systems which result in night work, shifts of unusual length, and unpredictable work hours, such as are presently employed by the railway industry, place workers and the general public at risk by creating a situation in which the workers ultimately become victims of chronic sleep deprivation. *NTSB Hearings on Head-End Collision of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988,* at 1622.

Dr. Tepas' studies on the effect of sleep deprivation and unpredictable and irregular work/rest cycles were summarized in the *National Transportation Safety Board Railroad Accident Report, Head-End Collision of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988, NTSB/RAR-89/02, (1989)* (Hereinafter "NTSB Report"). According to Dr. Tepas, workers do not remedy this hazardous condition by making up for lost sleep on their

days off, nor do they adapt to the irregular work hours. Dr. Tepas testified that chronic sleep deprivation results in fatigue, frequent microsleeps or lapses (periods in which workers fall asleep for a short time then awaken spontaneously, unaware that they had been sleeping at all). *NTSB Report*, at 37. Dr. Tepas notes that the frequency and duration of such lapses increase as the person becomes more chronically sleep-deprived. *Id.* Although the worker will perform his task perfectly both before and after the lapse, he is asleep during it. As a result, the worker will not respond at all to external stimuli unless they are massively sensory in nature, very unusual, or particularly meaningful. *Id.*

Also, Dr. Tepas stated that workers subject to non-systemic and unpredictable changes in their work schedules are highly susceptible to variation in alertness and consciousness that are associated with their circadian "body-clock", which is typically at its lowest ebb between roughly 1 a.m. and 7 a.m. He said that workers suffering from the effects of chronic sleep deprivation are more susceptible to environmental conditions which promote sleep. Extensive studies have been conducted on operating crews in which, not only single crew members, but on some occasions, entire crews have fallen asleep while performing their jobs. *Id.*

Based upon the NTSB's analysis of the Thompsontown accident and other prior accidents it concluded:

> 17. The changing nature of railroad operations and competitive factors have materially increased the relative number of train crew members who must work irregular and unpredictable shifts on a long-term basis.
>
> 18. Since train crew members lack the requisite training to recognize the condition, they may allow themselves to become chronically sleep-deprived and develop physiological problems that impact adversely on their performance. Conrail and the other railroads need to recognize and deal with this probability by modifying their operations to reduce shift irregularity and by instituting educational and intensified medical programs.

NTSB Report at 53.

Unpredictable work/rest cycles of the crew was cited by the NTSB as one of the causes of the Thompsontown accident. (*NTSB Report* at 54).

As pointed out by the former Chairman of the NTSB, James L. Kolstad, in testimony on February 19, 1991 before the House Subcommittee on Transportation and Related Agencies, Committee on Appropriations, concerning both the August 9 and November 7, 1990, railroad accidents at Sugar Valley, Georgia and Corona, California, work/rest cycles of railroad crew members is a concern. He said that crew member fatigue has been placed on the NTSB's *Most Wanted* list of safety issues. *Hearings on Department of Transportation and Related Agencies Appropriations for 1992 Before the House Subcommittee on the Department of Transportation and Related Agencies Appropriations of the Committee on Appropriations*, 102nd Cong., 1st Sess. 35 (1991).

Again, on June 12, 1991, Mr. Kolstad testified on the Railroad Safety Programs before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, where he stated:

> Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.
>
> Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules—a situation that has not changed since the beginning of railroading. The changing nature

> of railroad operations and competitive factors have increased the relative numbers of crewmembers and others in safety sensitive positions who must work irregular and unpredictable shifts—often on a long term basis.

Hearings on Railroad Safety Programs, Before the House Subcommittee on Transportation And Hazardous Materials of the Committee on Energy and Commerce, 102nd Cong., 1st Sess. 167 (1991).

He also said that *we have found in accident after accident that workload and work/rest issues have been critical factors. Id.*

The NTSB's Report of the Corona, California accident of November 7, 1990, also demonstrates the hazards in railroad operations resulting from irregularity and unpredictability of a train crew's work schedule. The Board concluded that both of the locomotive crew members had fallen asleep because of acute fatigue, partly resulting from the irregularity and unpredictability of the work schedule. *(National Transportation Safety Board Railroad Accident Report, Atchison, Topeka and Santa Fe Railway Company (ATSF) Freight Trains ATSF 818 and ATSF 891 on the ATSF Railway Corona, California (November 9, 1990)* RAR-91/103 at p. 45 (July 23, 1991).

Further support of the adverse safety effects of irregular work cycle is contained in *Biological Rhythms, Sleep and Performance,* by Wise B. Webb at pp. 59-87, 110-141, 175-204 (John Wiley & Sons 1982); and testimony of Dr. Charles Czeisler at the *Hearings on Shift Work Scheduling and Biological Clocks Before the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology,* 98th Cong., 1st Sess. 176 (1983).

The FRA itself has undertaken several studies of the issues related to irregular work hours, excessive work

hours, and waiting time, on February 1991 and June 1992. See *Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 and DOT-VNTSC-FRA-91-1 (February, 1991), (App. 25a) and *Engineman Stress and Fatigue: Pilot Tests,* U.S. Department of Transportation, Federal Railroad Administration, DOT/FRA/ORD-92-17 (June, 1992) (App. 46a). In the earlier study the findings were that: (1) Two of the three focus groups involved in the study cited unpredictable working hours as the most important single cause of stress and fatigue; (2) Many participants noted that sleep was often taken at times and in amounts which were inappropriate to the hours-on-duty which followed. Otherwise the employee would hardly ever be able to participate in family activities; (3) In the first focus group the railroad's train scheduling system is sufficiently advanced to provide 8 hours advance notice of jobs about 90% of the time; (4) Eight hours off duty seldom translates into more than four hours sleep because of the time required to get to a motel and eat, coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts. (App. 43a).

In the second FRA study, some of the findings showed that: (1) during the course of the experiment subjects tended to doze off, presenting the possibility of serious performance errors; and that (2) the sleep records of engineers were irregular and atypical when compared with non-engineers. (App. 48a, 51a-52a).

In another study by the FRA in Region 2, dated November 1994, the FRA identified several safety sensitive issues, which it determined would reduce the potential for train accidents. These issues were:

> Under the present limitations of the Hours of Service Act, railroad employees engaged in or connected with the movement of trains (train and engine crews)

may work up to 112 hours in any seven day week. Although FRA does not believe that many workers reach this total, it does believe that 80 to 90 hour work weeks are not extraordinary.

Under the law, after a tour of duty of up to 11 hours and 59 minutes, train crews must be given an eight hour off duty period. Within this time frame, workers must travel home, eat, bathe, sleep, and return to their reporting point. This routine may continue for an indefinite number of days without the worker having the legitimate opportunity to have a day off work. FRA believes that many employees are seriously fatigued. Conrail recognizes the problem but may often be faced with the option of granting workers a day off at a cost of annulling guaranteed service trains.

FRA also notes that Conrail has been conspicuously unsuccessful at limiting worker's hours of duty to the twelve hours prescribed by law. Over 75 percent of the violations filed by FRA inspectors in Ohio have occurred on Conrail. FRA Region 2 is responsible for enforcement across a territory that covers all or part of five Conrail Divisions. More than one-half of the violations filed in the Region against Conrail have involved the Dearborn or Pittsburgh Divisions. While almost all of this excess service involves waiting for transportation rather than operating trains, FRA believes that other railroads in OHIO, and other divisions on Conrail have more successfully addressed the problem.

Ohio Rail Safety Initiative, United States Department of Transportation, Federal Railroad Administration, Office of Safety, Region 2, at 7 (November 1994) (App. 56a-57a).

Finally, even the FRA, in its latest position on this overall issue, pointed out the safety hazards associated with irregular work hours and lack of rest.

> FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive performance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release.

App. 11a-12a.

CONCLUSION

Based upon the serious consequences to safe railroad operations that arise from the opinion of the Seventh Circuit in acting contrary to case law, the HSA's historical application, its legislative history, and its remedial purpose, the decision below should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civ. No. 90-51-JU

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Plaintiffs,

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, *et al.*,
Defendant.

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OPINION

MARSH, Judge.

This is an action arising under the Hours of Service Act, 45 U.S.C. §§ 61-66. The Hours of Service Act limits the hours of work of employees engaged in duties related to the safe operations of trains and mandates certain off-duty periods. Plaintiffs, locomotive engineers, seek judgment declaring that defendants have misinterpreted the Act's definition of "time on duty" set forth in section 61(b)(3) through their exclusion of time spent waiting for deadhead transportation from a duty assignment to the engineer's final point of release.

On January 31, 1991, Magistrate George E. Juba filed his Findings and Recommendation in this action in which he recommended granting defendants' motion for summary judgment and denying plaintiffs' summary judgment motion. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. *See* 28 U.S.C. § 636(b)(1)(C); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). Plaintiffs have filed timely objections. I have, therefore, given the file of this case a *de novo* review and have heard oral argument on the matter. For the reasons set forth below, I do not adopt Magistrate Juba's Findings and Recommendation.

DISCUSSION

Section 61(b)(3) of the Act defines time on duty as follows:

> Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:
>
> (A) Interim periods available for rest at other than a designated terminal;

> (B) Interim periods available for less than four hours rest at a designated terminal;
>
> (C) Time spent in deadhead transportation by an employee to a duty assignment: *Provided*, That time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty;
>
> (D) The time an employee is actually engaged in or connected with the movement of any train; and
>
> (E) Such period of time as is otherwise provided by this chapter.

The Act provides that it shall be unlawful for any railroad subject to the Act to require an employee who has been on duty for 12 hours to continue on duty until he or she has had at least 10 hours off duty or to require an employee to continue or to go on duty when he or she has not had at least eight consecutive hours off duty during the preceding 24 hours. 45 U.S.C. § 62.

The provisions relating to deadhead transportation—time spent by employees going to or from an assignment or travelling between assignments—were the result of 1969 amendments to the Act. The 1969 amendments also expanded time on duty to include time that is provided for rest in places other than the designated terminal or for less than four hours at a designated terminal in an effort to ensure that off duty time is available for "undisturbed rest." 116 Cong. Rec. H29.322 (daily ed. Oct. 9, 1969) (Statement of Representative Olsen).

The issue presented here is one of first impression and concerns whether time spent waiting for deadhead transportation from duty to the point of final release constitutes time "on duty" or time "off duty" under the Act as amended. In response to a request for clarification from plaintiffs, the Federal Railroad Administration ("FRA"), an agency of the Department of Transportation, interpreted time spent waiting for deadhead trans-

portation as "limbo time"—"neither time on duty nor time off duty." The FRA noted that where an employee waiting for deadhead transportation is required to perform service of any kind for the railroad, he or she would be considered on duty until all such duties were completed. In concluding that both the time spent waiting for deadhead transportation and the actual time spent in deadhead transportation constitute "limbo" time, the FRA emphasized that to hold otherwise would encourage employers to assign employees work during this waiting period contrary to Congress' intent.

Plaintiffs seek a declaration that the time an "employee remains on a train under the direction and control of the railroad while awaiting transportation to the point of final release" constitutes time "on duty." Plaintiffs concede that time spent in deadhead transportation from duty does not constitute time "on duty" based on the statute's treatment of deadhead transportation in section 61(b)(3)(C). With respect to time spent waiting for deadhead transportation, plaintiffs emphasize that the Act clearly defines "time on duty" as ending at the time the employee is "finally released from duty." Plaintiffs claim that this means that "time on duty" continues until the employee reaches his or her designated terminal unless the Act provides otherwise as it does with deadhead transportation from duty in section 61(b)(3)(C). Plaintiffs emphasize, and defendants do not dispute, that while waiting for deadhead transportation from duty, the employee is not free to leave the train and must protect the train from vandalism and undesired movement. Plaintiffs also emphasize that the phrase "time spent in deadhead transportation" is well recognized as including only the time that an employee is actually moving. *See* Hearings on H.R. 8449, H.R. 84, and H.R. 9515, Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 29-30 at 134 (1969) (testimony of R.R. Manion, Vice President of the Association of American Railroads, defining deadheading as "travel performed by railroad"); S. Rep. No. 604, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code and Cong. & Adm. News 1636, 1640-41 ("[t]he phrase 'deadhead transportation to duty assignment' in section 1(b)(3)(C) is intended to mean *that time spent traveling* by the employee calculated from the time he reports for duty until he reaches his duty assignment") (emphasis added). In the alternative, plaintiffs argue that time spent waiting for deadhead transportation from a duty assignment is "on duty" time because it constitutes "interim periods available for rest at other than a designated terminal" and is therefore covered by section 61(b)(3)(A) of the Act.

The purpose of the Hours of Service Act is "to promote safety in operating trains by preventing the excessive mental and physical strain which results from remaining too long at an exacting task." *Chicago & A.R. Co. v. United States*, 247 U.S. 197, 199-200 (1918). The legislation was enacted based on a recognition of "the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men [and women] whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions." *Atchinson R.R. v. United States*, 244 U.S. 336 (1917). Based on the recognition that the Act is "remedial and in the public interest," the Supreme Court has emphasized that the Act should be liberally construed "in the light of its humane purpose." *Id.*; *accord United States v. Atlantic Coast Line R.R.*, 153 F.2d 243 (4th Cir. 1946) (the Act is "intended to protect the employee, the employer, and the public and to this end must be liberally construed").

While deadhead transportation both to and from service was generally considered "off duty" time prior to the 1969 amendments, employees were treated as on duty even though inactive, "waiting, doing nothing," where, as here, they were "under orders, liable to be called upon at any moment, and not at liberty to go away."

Missouri K & T Ry. v. United States, 231 U.S. 112, 119 (1913); *accord See United States v. Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917); *Northern Pacific Ry. v. United States*, 220 F. 108, 110 (9th Cir. 1915); *San Pedro L.A. & S.L.R.R. v. United States*, 213 F. 326, 328 (8th Cir. 1914); *United States v. Pennsylvania R.R.*, 275 F.Supp. 345, 348 (W.D. Pa. 1967). Defendants contend that these precedents are no longer good authority because they were decided prior to the 1969 amendments to the Act and therefore involved situations where the only interpretation possible was a finding that the employee was either "on duty" or "off duty."

The parties agree that deadhead transportation from duty is exempted from the definition of "on duty" based on the Act's reference to time spent in deadhead transportation "from duty to his [or her] point of final release . . . not be[ing] counted in computing time off duty." No reference is made to time merely spent waiting for deadhead transportation from duty to the point of final release. Having reviewed the record, I find that, based on section 61(b)(3)'s wide definition of "time on duty," prior caselaw, the legislative history of the 1969 amendments, and the purpose of the Act, the time an employee remains on a train under the direction and control of the railroad while waiting for transportation to his or her point of final release constitutes time "on duty." I find no basis for concluding, as defendants suggest, that Congress intended to overturn prior judicial holdings that time spent waiting constitutes time on duty. Rather, I find that Congress intended time spent waiting for deadhead transportation to fall within the general statutory definition of time on duty which commences "when an employee reports for duty and terminate[s] when the employee is finally released from duty." 45 U.S.C. § 61(b)(3). Section 61(b)(3)(C)'s reference to deadhead transportation from duty is limited to the actual time spent travelling to the final point of release. To hold otherwise would defeat Congress' intent and result

in the anomalous situation whereby an employee would be "on duty" if the period were available for rest but "off duty" where the employee, under the direction and control of the railroad, is waiting for transportation to his or her final point of release. Accordingly, giving due deference to the FRA's interpretation of the Act, I find that the agency's interpretation was not "based on a permissible construction of the statute." *Chevron v. U.S.A., Inc. v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837, 842-43 (1984). Plaintiff's motion for judgment is granted.

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied.

DATED this 30th day of May, 1991.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX B

[Logo]

U.S. Department
of Transportation

Federal Railroad
Administration

BY HAND

Robert W. Blanchette, Esq.
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Dear Mr. Blanchette:

As you are aware, on December 29, 1994, the United States Court of Appeals for the Seventh Circuit issued a decision in the case of *Atchison, Topeka, and Santa Fe Railway Co.* v. *Peña* (Nos. 93-1505, 93-2378, and 93-2712) (*en banc*).[1] This case concerns the Federal Railroad Administration's (FRA) interpretation of the Federal hours of service laws as they pertain to the status of train crewmembers waiting for the arrival of deadhead transportation to their point of final release. In response to the legal challenges filed in 1993 by nine major railroads, the Seventh Circuit Court of Appeals, sitting *en banc*, ruled unanimously against FRA and held that time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is *not* time on duty, but rather "limbo time" (*i.e., neither on- nor off-duty time*). Slip opinion at page 13.

[1] The Seventh Circuit is comprised of Illinois, Indiana, and Wisconsin.

The Seventh Circuit's holding coincided with the position that FRA had traditionally taken until the agency changed its interpretation in late 1992. Prior to that change, FRA had considered an employee to be on duty during the time spent waiting for the arrival of the deadhead vehicle *only* if the employee actually had duties to perform. If the railroad had relieved the employee of all responsibility, FRA had considered such time spent merely waiting for the deadhead vehicle to arrive as limbo time for hours of service purposes.

However, on September 22, 1992, in response to lawsuits filed by the United Transportation Union and the Brotherhood of Locomotive Engineers, a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that such time spent waiting for transportation is to be considered on-duty time. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992).[2] Although FRA disagreed with the Ninth Circuit's legal rationale, FRA recognized both the ambiguity of the Federal hours of service laws' pertinent provisions and the reasonableness of the court's ultimate conclusion as to the proper reading of those provisions. Accordingly, in the interest of uniform application of the Federal hours of service laws and to promote the safety of railroad operations, FRA decided to treat the Ninth Circuit's opinion as binding throughout the entire nation.

FRA has always believed that both the Ninth Circuit's interpretation of the relevant hours of service provisions, and what became the Seventh Circuit's interpretation, were reasonable. While FRA adopted the Ninth Circuit's interpretation primarily to achieve national uniformity, the decision of the Seventh Circuit has now made this goal impossible to achieve unless and until the United States

[2] The Ninth Circuit, of course, includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Supreme Court resolves the split between the circuit courts. Moreover, upon review of the Seventh Circuit's unanimous, *en banc* decision, FRA concludes that the Seventh Circuit's reading of the pertinent hours of service provisions is better reasoned than the decision of the Ninth Circuit.

Accordingly, FRA has decided to adopt the Seventh Circuit's decision as its own view in every state in the nation located *outside* of the jurisdiction of the Seventh and Ninth Circuits, beginning at 12:01 a.m. on March 6, 1995.[3] FRA has chosen March 6 because it will allow sufficient time for FRA to notify its field inspectors and the regulated community of FRA's revised interpretation. FRA also believes that by selecting one uniform date for the remaining implementation of its revised interpretation the impact on both FRA and the regulated community will be kept to a minimum.

This means that *effective on March 6,* FRA will treat an employee merely required to remain on a train (at a location outside of the territory of the Ninth Circuit), while awaiting the arrival of deadhead transportation to a point of final release, as neither on nor off duty; the employee's status most closely resembles, and is part and parcel of, deadheading from duty. However, as FRA stressed in its August 4, 1989 letter (copy enclosed) to Mr. Lawrence Mann, counsel for the rail labor unions, if an employee is required to perform service of any kind during that period (*e.g.*, protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives or checking fluid levels, or communicating train consist information via radio), he or she will be considered as on

[3] However, since the Seventh Circuit issued the mandate in its decision on February 27, 1995, *see* Fed. R. App. P. 41, FRA began applying the revised interpretation inside the jurisdiction of the Seventh Circuit effective at 12:01 a.m. on that date.

duty until all such service is completed. The Seventh Circuit's holding did not address the situation in which a crew that has expired under the Federal hours of service laws is called upon to perform nonoperational duties (*i.e.*, commingled duties) while it waits for the arrival of the deadhead vehicle after the expiration of the maximum 12 hours. However, in a footnote, the court made clear that "the statute accounts for that circumstance" by treating such time as time on duty. Slip opinion at page 10, footnote 4; *see* 49 U.S.C. § 21103. Of course, where a railroad's operating rules clearly relieve employees of all duties during the waiting period and no duties are specifically assigned, the waiting time will be considered limbo time.

Although it is FRA's expectation that the split between the Ninth and Seventh Circuits concerning their differing interpretations of the Federal hours of service laws will eventually be resolved by the United States Supreme Court, pending such resolution, FRA will, out of deference to the court of jurisdiction, continue to treat time spent merely waiting for the arrival of deadhead transportation to the point of final release as time on duty *when it occurs within the territory of the Ninth Circuit.* FRA will therefore expect affected railroads to record such time as time on duty and file reports of excess service, as necessary, under 49 C.F.R. Part 228.[4]

FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep

[4] Although time spent awaiting the arrival of deadhead transportation will still constitute time on duty within the territory of the Ninth Circuit, FRA will continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties.

cycles and the effects of fatigue on safety-sensitive performance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release. Accordingly, it is FRA's expectation that the railroads will voluntarily employ their best efforts to minimize the time that employees spend waiting for the arrival of deadhead transportation throughout the remainder of the United States.

We would appreciate your making this letter known to your member railroads. In due course, we will amend Appendix A to 49 C.F.R. Part 228 in accordance with the views stated herein.

/s/ S. Mark Lindsey
S. MARK LINDSEY
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Enclosure

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APPENDIX C

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-51-JU

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

SAMUEL K. SKINNER, *et al.*,
Defendants.

County of Los Angeles)
State of California) ss:

AFFIDAVIT OF R.E. FUTRELL

1. My name is R.E. Futrell. I reside at 5132 Hickory Circle, Cypress, California 90630. I am currently employed as a Associate Transportation Operations Supervisor for the California Public Utilities Commission.

Between 1974-1981, I was employed for 7 years as a FRA safety inspector in Region 7, which includes California. From 1981-1984 I was the District Supervisor for the FRA. I was responsible for supervisory direction of 18 safety inspectors at 5 FRA district offices in California, Utah, Nevada and Arizona.

2. As part of my duties at FRA, I inspected the railroads for violation of the Hours of Service Act. During this time I processed many cases where crews were required to remain on a train after being on duty 12 hours. My instructions from the FRA were to file violation reports in cases where the crew was not free to leave the train at 12 hours. I also discovered during my investigations that not only were the crews not permitted to leave the train until another crew arrived, but also if the employee became aware that vandals had released the train's hand brakes, corrective action by the crew would be necessary in order to prevent any undesired movement. Additionally, it was expected that if an employee noted train vandalism or passing trains with defects, the crew would promptly inform the railroad.

3. A common example of the kind of violations which I discovered and was enforced by FRA is shown by Attachment 1. As significant to this lawsuit, the crew there was not permitted to leave the train after 12 hours, and remained 3½ hours after expiration of the legal limit. Mr. J.W. Walsh, Associate Administrator for Safety at FRA forwarded the violation report to the Chief Counsel's Office for imposition of a fine. In doing so Mr. Walsh by letter informed the union the "It is our opinion that the time during which this crew was required to remain with the train should be considered as on-duty time."

4. As part of my duties as District Supervisor for FRA, I supervised the safety enforcement by the safety inspectors under my jurisdiction. This included Hours of Service Act violations.

5. Between 1964 and 1974 and from 1985-1990 I was employed in by the Southern Pacific Transportation Company in both train and yard service, and promoted to conductor in 1969. In that position it was not uncommon for me to be required by the railroad to remain on the train after expiration of the 12 hours limit until relieved by another crew. Our crew was then responsible for protecting the train against vandalism, if we became aware of it, protecting the train from undesired movement should vandals tamper with the hand brakes, and to notify proper personnel if we noted a passing train with defects.

6. Also, until recently, I was Local Chairman of Local 1846, United Transportation Union. As such I have personal knowledge of disciplinary proceedings on the Southern Pacific Transportation Company and the requirements imposed on crews by the railroad. I believe that a crew could be disciplined in each of the following examples: (a) If the crew left the train without permission after going on duty 12 hours before, unless it is first relieved by another crew; (b) If the train is vandalized and the crew was aware and did not attempt to protect it; (c) If the brakes leaked off and caused an undesired movement, particularly if an accident occurred as a result; (d) If the crew observed an obvious defect on a passing train and did not promptly inform the railroad.

7. Also in my capacity as local chairman, I am familiar with many instances where crews are required to remain on the trains more than 12 hours after going on duty. It was not uncommon in the past for the crew to remain on the train at least several additional hours and have the same responsibilities as I described in #5.

Further affiant sayeth naught.

/s/ R. E. Futrell
R. E. FUTRELL

Subscribed and sworn to before me a Notary Public this 1st day of October 1990.

/s/ Sharon C. Yeo
Notary Public

My Commission Expires: 8-21-92 [Seal]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil Action No. 90-51-JU

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff

v.

SAMUEL K. SKINNER, *et al.*,
Defendants

County of Cuyahoga)
State of Ohio) ss.

AFFIDAVIT OF C.E. ANDERSON

1. My name is C.E. Anderson. I am a locomotive engineer and I am employed by the Brotherhood of Locomotive engineers with its principal headquarters located at 1370 Ontario Street, Cleveland, Ohio.

2. As part of my official duties I receive complaints of violations of the Hours of Service Act from the BLE members throughout the country, and I coordinate the processing of the complaints with the FRA.

3. During the past few years I have forwarded to Washington, D.C. numerous violations of the HSA as they relate to employees remaining on trains after the expiration of 12 hours from the time they went on duty.

4. Typically these complaints demonstrate facts whereby employees are required to remain on trains several hours and sometimes up to 10 hours after expiration of the 12

hours from the time the crew went on duty. Representative examples of some of these instances are attached hereto collectively as Attachment A.

5. Only rarely is the crew free to leave the train upon reaching the 12 hours limit. The crew may leave the train only after arrival of another crew to relieve it. Also, the crew must await any further instruction from the railroad.

6. The employee must comply with the Raiload's General Code of Operating Rules. At the very least the crew is not permitted to leave the train unattended, and must protect against vandalism. In addition, the crew must await any further instructions from the railroad. Also, as part of an employee's general duties, he/she observes passing trains for any obvious defects and reports them to the railroad. Finally, the crew must keep brakes properly set so that there will not be an unintended movement of the train.

7. If the employee left the train without specific permission, he/she would be disciplined (possibly fired) by the railroad. The crew would also be disciplined if the train is vandalized and the crew took no action to prevent it, if the brakes did not remain set properly and the train moved without permission, or if the crew observed a defect on a passing train and did not inform the railroad officials promptly.

8. A railroad can easily eliminate the problem of excessive hours on duty. All that a railroad needs to do is to plan in advance to have a crew ready to relieve the crew on the train, and to have transportation waiting to transport the crew to the point of final release. The railroad can obtain advance notice simply by following the train movements, knowing thereby whether the crew on the train will reach the 12 hour limit. Furthermore, the limit is usually reached in relatively close proximity to the point of final release—the designated terminal.

Further affiant sayeth naught.

/s/ C.E. Anderson
C.E. ANDERSON

Subscribed and sworn to before me a Notary Public this 10th day of October 1990.

/s/ Faye Oroz
FAYE OROZ
Notary Public

Notary Public for the State of Ohio

My Commission Expires Feb. 4, 1995

APPENDIX E

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-51-JU

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

SAMUEL K. SKINNER, *et al.*,
Defendants.

County of _____)
State of _____) ss:

AFFIDAVIT OF JEAN CHRISMAN

1. My name is Jean U. Chrisman, I reside at 5525 North 14th Road, Arlington, Virginia 22205.

2. I am the former Director of the Office of Safety Programs for the Office of Safety, Federal Railroad Administration (FRA). I retired from employment with FRA in October 1981. Prior to assuming that position I served in the FRA's Office of Safety as the Chief of the Compliance Division, Chief of the Field Operations Division, and Special Assistant to the Director of the Bureau of Railroad Safety. Prior to the transfer of the railroad safety functions from the Interstate Commerce Commission (ICC) to the Department of Transportation and FRA in 1967, I served as a field Inspector (Hours of Service), and as a Zone and Field Supervisor for the ICC. As a field inspector for the ICC I was one of twelve Hours of Service Act (HSA) Inspectors in the United States.

3. I also spent 15 years in various operating department positions (all subject to provisions of the HSA) with the St. Louis Southwestern Railway Company.

4. My duties as Director of the Office of Safety Programs required me to coordinate FRA field inspection forces throughout the United States. At that time there were approximately 300 inspectors and supervisors located in eighty safety districts around the United States whose duties and responsibilities were to administer and enforce the various rail safety laws and regulations, including the HSA. In coordinating the FRA field inspections, my duties also included maintaining and assigning for investigation all complaints sent to FRA which alleged violations of federal railroads safety statutes, including the HSA.

5. I have reviewed the complaint and answer filed in this lawsuit. I am personally familiar with the provisions of the HSA and the interpretation by the FRA of the provisions applicable to the facts in this lawsuit.

6. During the past several months I reviewed many HSA complaints that had been submitted to the FRA by railroad workers represented by the United Transportation Union and the Brotherhood of Locomotive Employees.

Each of the complaints showed facts where railroad workers were required by a railroad to remain on a train after expiration of the maximum 12 hours allowed railroad workers to be on duty by the HSA. In many of the complaints I reviewed, employees had remained with the train several hours over the 12 hour limits of the HSA, and in some cases the excess time was up to 10 additional hours.

7. I was informed that in each case the employee was not permitted by the railroad to leave the train. Further, I was advised that the employees were, at the very least, responsible for protecting the train against vandals, assuring that the brakes remains secured so that there would be no undesired movement of the train, and in some cases to observe passing trains for any obvious safety defects, and to await any further instructions by the railroad.

8. In my various positions both at the ICC and at the FRA, in enforcing the HSA, if an employee was not free to come and go as he/she pleased at the point of relief, the time was considered time on duty. The FRA consistently interpreted the HSA as stated above until my retirement. For example see FRA violation Report No. 108 dated March 16, 1981 (attached hereto). There a conductor was denied a request that railroad allow his wife to pick up the crew after being relieved. The dispatcher instructed the crew to remain with the train and the FRA inspector filed a violation report because the crew was not free to come and go as they pleased.

9. I am familiar with the statutory changes to the HSA in 1969 (which became effective on December 26, 1970), and the subsequent amendments by Congress. In each case the purpose of the changes by Congress was to provide greater protection to employees, because of the abuses by some railroads and to help eliminate accidents caused by fatigue. Congress did not change the original law that time on duty shall terminate when the employee is finally released from duty. Also in clarifying deadhead transportation the Congress made it clear that

it included only the time actually spent in traveling from duty to point of final release.

10. I believe the above is particularly significant because Congress began consideration of changes in the the HSA soon after a court decision in 1967. A district court in Pennsylvania had ruled that as long as an employee is subject to orders of the railroad, such employee's time is being consumed on behalf of the railroad at its directions and for its presumed benefit. Therefore, such time was "on duty". Congress was certainly aware of that decision, but it did not disagree with the case, nor change the impact of the decision in the 1969 amendment or later changes in the Act.

11. One change that Congress made in 1969 was that all time available for rest at other than a designated terminal is counted as time on duty. This provision completely settles the point that the period of time before the crew begins actual travel in deadhead transportation is time on duty.

12. I have reviewed the letter to J.W. Walsh, Associate Administrator for Safety at FRA from Lawrence M. Mann dated August 17, 1988 and the response by Gregory B. McBride, Assistant Chief Counsel for the Safety of the FRA, dated August 4, 1989. I believe that Mr. McBride's response is inconsistent with the requirements of the HSA. Further, by such interpretation as in the McBride letter, it would allow the railroads to circumvent the requirement that an employee after 12 continuous hours on duty be given 10 hours off duty. The employees in these cases were given only 8 hours off duty, since the railroads instructed the employees to mark off at 11 hours and 59 minutes to avoid application of the 10 hours off duty.

Further affiant sayeth naught.

/s/ Jean U. Chrisman
JEAN U. CHRISMAN

Subscribed and sworn to before me a Notary Public this 27th day of Sept. 1990.

/s/ Rosemary G. May
Notary Public

My Commission Expires: 5/25/92

APPENDIX F

[Logo]

U.S. Department of Transportation

Federal Railroad Administration

ISSUES IN LOCOMOTIVE CREW MANAGEMENT AND SCHEDULING

Office of Policy
Washington, DC 20590

John K. Pollard

Volpe National Transportation Systems Center
Cambridge, MA 02142-1093

February 1991
Final Report

EXECUTIVE SUMMARY

The purpose of this study is to explore matters related to the scheduling and management of locomotive crews, particularly as they impinge on fatigue and stress. The intent is to provide FRA and other concerned officials with an understanding of how crews are scheduled currently, the causes of unpredictability in schedules, whether various aspects of current practices may contribute to fatigue and stress, and what options exist to improve matters.

Since very little documentation exists pertaining to these questions, this exploration was conducted almost entirely by means of interviews with operating managers, dispatchers and crew callers on various railroads, discussions with BLE and UTU officials and focus-group sessions with working engineers, as described in Section 1. A representative sample of seven Class I railroads participated.

Section 2 of this report describes the mechanics of scheduling trains and crews on each of the seven roads. The timing of scheduling decisions, current problems and planned improvements in communications and control are discussed.

Section 3, based primarily on the comments and views of engineers in the focus groups, describes the principal factors contributing to fatigue and stress in the current environment. These include:

- uncertainty as to the time ones next job will be called,
- excessive working hours (at certain terminals),
- long commutes and waiting times (for some workers),
- the poor condition of locomotives and other equipment (at some locations),
- unsatisfactory conditions for sleeping at some terminals,

- poor distribution of workload among the crew, and
- interpersonal conflicts with dispatchers and crew callers.

To this list, many managers would add deliberate choices by crewmen to do something other than resting even when they knew the should be resting. Attempting to make quantitative statements about the relative importance of each of these contributors to fatigue would require appropriate survey data, which is not available.

Railroad management seems well aware of these problems and inclined to take action on some of them. In Section 4, these possibilities are discussed. In particular, most railroads have plans to upgrade communications and control systems over the next few years so as to improve their ability to forecast train arrival and departure times. Providing an eight- or ten-hour advance notice of call accurate to plus-or-minus two hours 90% of the time or better is viewed as a goal achievable within three or four years by most of the managers interviewed. Engineers and labor officials felt the prospects for meeting this target would be greatly enhanced if there were a penalty payment assessed for each failure to supply such notice.

Because the vast majority of road crews work in first-in, first-out rotating pools, advance knowledge of train departure times is only half the solution to providing advance notice of call. In many situations, when one worker unexpectedly "marks off" (becomes unavailable because of illness or any other reason) every other worker with lower standing in the same pool moves up one position in the standings, i.e., leaves on an earlier train than previously estimated. Providing an accurate advance notice of call would be impossible in such situations. However, changing these practices could be done only in collective bargaining. Adoption of such changes should be beneficial to both sides and may proceed expeditiously once systems for predicting train departure times accurately are working well.

Some of the other sources of fatigue and stress, related to the condition of equipment and facilities, will require significant financial outlays to correct. These raise questions about economic issues which are beyond the scope of this study. However, many others are low-cost items, such as, broken air conditioners and wheel-revolution counters.

Many of the remaining causes of stress and fatigue result from failures to adapt to changes in technology, organization and location of facilities. Following these changes, seniority rights have left a good many individuals in jobs which do not suit them very well in one way or another. Workers are often mismatched to their jobs in the sense of having been compelled to move away from communities to which they have strong ties, or in the sense of having very long commutes (longer than 50 miles), or sometimes in having to do work which they dislike (e.g., redundant operating employees assigned to clerical jobs). Only the passage of time, adjustments in relative wages and salaries, and/or "buy outs" can eliminate these individuals who are mismatched to their jobs. Other failures to adapt to change are rooted in provisions of labor agreements dating back decades. By and large, both labor and management know what needs to be done, but actually doing it is often impeded by the gamesmanship of the negotiating process. In many cases the result of the bargaining process is a phased-in introduction of some change so that it affects only new hires. Thus periods of more than 20 years may lapse before some of the desired changes described herein are fully implemented.

1.0 INTRODUCTION

1.1 Background

In order to examine the subject of fatigue and possible sleepiness in relationship to the job of railroad operating personnel, it is necessary to understand thoroughly the mechanics of the crew scheduling process and the notification (crew calling) procedures currently in use. The scheduling and calling of railroad operating crews is a function of the union-management labor contracts and the demands of an efficient rail freight system. Although railroad personnel have a working understanding of their own systems, documentation of these systems comprehensible by outsiders does not exist. A systematic examination of how crews are scheduled, and the potential effects on safety, needs to proceed from specific factors. Careful scrutiny of the operating environment is necessary in order to test hypotheses and to understand the full costs and benefits of implementing alternative practices.

1.2 Objectives

The purpose of this effort is to develop a report that describes the present crew scheduling and notification systems in objective, straightforward terms. For each railroad studied, key decisions and information flows affecting crew calling are identified. Particular attention is focused on the causes of uncertainty in each of these decisions. Ideas for improvements have been collected from each person or group interviewed.

An understanding of how uncertainty affects fitness for duty has also been sought. In the absence of established objective measures of fitness for duty, the best alternative is simply asking working engineers about their experiences and what causes stress and fatigue.

1.3 Approach

Examination of the literature revealed nothing in the way of description of how crew scheduling systems work. Although there is a substantial body of research on the effects of sleep deprivation and disruption of circadian rhythms, none has been found which focused on locomotive crews. The few recent publications which relate to

railroads at all have been concerned with training personnel to cope better with their odd working hours, rather than exploring the causes of those unpredictable hours and the prospects for reducing the uncertainty.

In view of the absence of useful documentation, the approaches taken for this project focused on gaining an understanding of the issues through discussion with persons directly involved with managing and scheduling locomotive crews and with the working road engineers.

1.3.1 Interviews

The bulk of this report is based on interviews conducted with staff and operating personnel of several major railroads. These interviews were conducted on site at dispatching and crew-calling centers operated by the participating railroads. Depending on the organization of the railroad in question, these sites may have been located at the division level, at the single centralized facility for the entire railroad, or at some intermediate level.

Most of the interviews were arranged by writing and/or telephoning each railroad's vice president for operations and explaining the objectives of the project. Further arrangements were then made with whatever officials were designated by senior management. In some instances, contacts were initiated at the division level or directly with the manager of crew calling.

Nearly all of the railroads contacted agreed to participate. The managers involved proved most generous with their time in providing full and frank responses to all questions. Two of the roads, Burlington Northern and CSX, contributed glossaries of crew-calling terminology, which were merged and reproduced as Appendix A.

Several labor officials were also interviewed. These discussions focused on their perceptions of the effects of current scheduling practices on the fatigue and stress levels of their members and their ideas for improvements.

As with management, cooperation with the study was excellent.

1.3.2 Focus Groups

In order to gain insight into the perceptions of engineers about the factors causing stress and fatigue, a series of focus-group discussions was arranged through the cooperation of the Brotherhood of Locomotive Engineers. These discussions allowed the author to question about two dozen engineers and directly observe their reactions to various proposals for change.

The first of these groups consisted of six engineers working out of a major East Coast terminal. Their situation was one in which train departure times were relatively more predictable than on most other railroads, but working hours were greater due to a shortage of staff. Most worked in pools on jobs of 140-150 miles, but two had assigned service runs of about 300 miles.

The second group consisted entirely of engineers working in road-freight pools. About half of them worked in interdivisional pools with runs of 232 or 256 miles; the remainder worked on a 143-mile run. Their monthly work quotas were based on 3900 miles, so that those in the long pools needed to work only eight or nine round trips per month. Working hours averaged slightly more than 40 per week in this group, but total hours away from home ran to 70-75 per week.

In the third group, most of the jobs were in pools exceeding 200 miles, but two were from extra-boards protecting such service, and two were from helper districts. Monthly quotas were based on 3800 miles, which implies eight round trips per month. An average of about 48 working hours per week were required to complete two round trips.

3.0 SOURCES OF STRESS AND FATIGUE IN CURRENT PRACTICES

This discussion of the sources of stress and fatigue is based almost entirely on the remarks of two dozen working engineers made during the three focus group sessions described in Section 1.3.2. This summary of the sessions was circulated to the BLE local and general chairmen who organized the sessions for their review and reflects any corrections made by them.

At the start of each focus-group session, there was a general discussion of the significance of stress and fatigue in the lives of engineers. In every group, fatigue was felt to be a major problem, at least as much of a threat to safety as substance abuse. Efforts by management, unions and government to curtail substance abuse were viewed as having been largely successful; comparable efforts to mitigate fatigue and stress are sought.

Numerous incidents or near accidents were described in which an engineer had dozed off. They noted that many of these incidents went unnoticed and that a large proportion of those that were noted by management were dealt with through informal disciplinary practices, which generated no records. Thus they felt statistical analysis of accident and incident records could not give a meaningful picture of the significance of fatigue.

3.1 Uncertainty as to Time of Call

In two of the three groups, unpredictable working hours were identified as the most important single cause of stress and fatigue, although several other significant causes were also present, as described below. (In one group, which was based at an unusually busy terminal, the sheer number of working hours was the primary cause, as discussed in 3.2.)

Everyone of the engineers agreed that there was too much uncertainty about when he would be called to report for work. Because of it, all commitments to family and friends were tentative and subject to frequent disruption, which contributes to a considerable amount of stress and discord within many families.

Many participants noted that sleep was often taken at times and in amounts which were inappropriate to the hours on duty which followed. If an engineer tried to sleep every day that there was a possibility he would be called to work that night, he would hardly ever be able to participate in family activities. Hence there was a tendency to go ahead with normal daytime activities and take the risk of having to work without being properly rested, whereas if there were reasonable certainty about when jobs would start, most engineers would be willing to give up or reschedule the other activities. There were also many instances cited in which jobs were not called until long past the time originally estimated, which resulted in situations in which the engineer was ready to sleep again when the call finally came. In short, there was general agreement that the more certainty as to when the next job will be called, the more likely an engineer is to be appropriately rested.

Closely related to uncertainty about the timing of jobs was the sense of lack of control over one's life. At one of the railroads, management strongly discouraged marking off for personal reasons, so much so that was hardly ever done. Instead, men who wanted time off were forced to lie by calling in sick, to let the telephone go unanswered or to verbally abuse the callers. Men whose personal ethics prevented their using these tactics ended up working even more because of the time off won by the liars and cheats. The other two roads generally allowed marking off for one or two or three days without penalty.

The causes of uncertainty about time of call were numerous and varied substantially among the three railroads. At the first focus group, there was a perception (later confirmed by management) that the railroad's train

scheduling system is sufficiently advanced that it could provide eight hours advance notice of jobs about 90% of the time. However, in practice the engineers report that they are unable to get the information they want for the following reasons:

(1) The usefulness of the information available from the crew callers is highly variable. Some callers are almost always helpful and provide all the information at their disposal. Other callers are habitually prone to withhold information and are often downright rude. Sometimes the callers are so busy that they really do not have time to provide complete information.

Callers sometimes withhold information deliberately even when they have time to talk because they know that crew members would prefer to avoid certain jobs and that if crewmen can estimate when those jobs will be called, they will not answer the phone during that period in hopes of getting the next (and better) job instead.

(2) Although information on standing is available from a computerized voice-response system, it is apparently not updated automatically in real time. Furthermore, information on train lineup is not included, hence the system is not very useful for estimating when one's next job will be called.

(3) Crew members have not been given copies that would permit them to check on train lineups from the computer terminals accessible to them.

(4) As a result of the shortcomings of the other means of getting information, crewmen frequently resort to calling Yardmasters and Trainmasters to find out when trains are likely to ready for departure. Management attempts to discourage this practice but it goes on anyway.

(5) Although the railroad's computerized system was designed to provide access from personal computers via dial-up phone lines, this option has never been implemented. The rationale for this decision was unknown.

The engineers in the second focus group worked on districts in which train dispatching was only partially computerized and crew management was still predominantly manual. Information about train locations and lineups was often simply unavailable to crew callers on a timely basis. Contributing further to their uncertainty they described the following:

(1) Even when accurate information regarding train lineups and crew standings was available to crew callers, some of them failed to make it available to engineers. The reasons for their failure ranged from being too busy, to incompetence, to personal hostility toward a particular engineer calling.

(2) Standings were frequently readjusted to satisfy various objectives of management and/or of labor agreements. Examples of reasons for these changes include minimizing away-from-home lodging costs, minimizing deadheading costs, and meeting mileage quotas of different districts supplying crews to an inter-divisional pool. The timing of the changes in the pool operation and the standings of individual engineers was unpredictable.

(3) Informal, verbal agreements between callers and local chairmen can further alter the standings of individual engineers in ways that are both unpredictable and unreported to involved persons.

(4) Trains, except for intermodal or other high-priority traffic, were often delayed until an away-from-home crew was rested in order to minimize costs. This practice changes both lineups and standings and creates additional uncertainty.

(5) Clerks were often derelict in updating recorded announcements of standings information because of other demands on their time. Examples were described in which announcements were more than 24 hours old.

(6) Reaching either a crew caller or a recorded announcement was sometimes difficult. Busy and unanswered phones were a common occurrence.

(7) Those engineers who worked to a distant terminal which had computerized standings available reported that the service was as yet of little value since train lineups, deadheading lists and other pertinent items were not usually included.

At the third session, computerized dispatching and crew-calling systems had recently been installed, but the engineers said that the accuracy of estimates of train departures was still poor for the following reasons:

(1) The dispatching system does not yet have all the necessary automated communications links in place. Thus the dispatchers are often working with information several hours old.

(2) Complaints about dispatching errors were common. Numerous cases of being stopped or held in a siding for an hour for no apparent reason were reported. Meets were often poorly coordinated i.e., one train was put in a siding much earlier than necessary or desirable for efficient operation. These errors caused delays and introduced additional uncertainty into the schedule.

(3) Certain dispatchers were reported to delay trains for no legitimate reason, but rather to punish engineers who had incurred their displeasure. Management was described as unable to fire these dispatchers because it was so difficult to attract anybody to fill the positions.

(4) Locomotive reliability is poor. The probability that one or more units in a consist will fail on a given

trip is estimated at 50%. Although it is usually possible to reach the destination, arrival will be delayed significantly. Poor reliability results from an inadequate maintenance program coupled with tendency on the part of middle managers to defer expenditures for replacement parts and equipment. Instances of denial of equipment problems on the part of various managers were cited by several participants. Failures by round-house crews to fill fuel tanks and sand boxes were also a problem.

(5) Many of the run lengths were chosen by management to require eight hours or more even with everything operating normally. There is not much leeway to account for the minor delays and/or extra work (doubling a hill, pickups and setouts, etc.) that occur most of the time. The result is that long-pool crews frequently "die" under the Hours of Service Act. They are compelled to tie up and wait for transportation to their destination terminal, which adds further delay and uncertainty. Participants reported numerous instances in which 15 or 16 hours had elapsed from the time they reported for duty until they reached their destination terminal or place of rest.

Dealing with all of these problems is a major challenge for the railroads. Engineers suggest the following goals:

(1) Operating most trains on predictable schedules. Substantial investments in locomotives and track, improvements at bottlenecks, etc. may be required in some situations.

(2) Dispatching systems must be upgraded and linked to other railroads and major customers to provide reasonably accurate estimates of train arrivals and departures.

(3) An adequate information system for operating employees should show train lineups in each direc-

tion, standings (with each employee's name listed along with his rest status and any other pertinent information, such as intended deadheads), and an estimate of when the calling employee will next go to work.

(4) The information should be updated in real time.

(5) Access to the information should be available through a variety of means including automated voice response, talking to the callers, remote terminals and home computers. Each medium should have sufficient capacity that busy signals and unanswered lines are rare.

(6) Crews should be called eight to ten hours in advance, with a tolerance of one or two hours. (There was great doubt that any such performance would ever be achieved unless there were a significant penalty payment for non-compliance incorporated in labor agreements.)

3.2 Total Hours of Work

At the first focus group, it was agreed that the most important cause of fatigue and stress was simply the total number of hours of work that had to be done. An upsurge in business, several retirements and some transfers to Amtrak had left the pool significantly undersized. The inherent delay in recruiting and training replacement engineers had led to a situation in which engineers were required to work 21 days straight in order to get one day off, which was expected to persist for another few months. Although these engineers also identified a number of changes in scheduling, information availability, etc (discussed below) which could help mitigate stress and fatigue, none of these were as important as simply reducing the work week to 40 to 50 hours, at least for those men who wanted the reduction.

In this group, there was an extended discussion of the issue of who gets which job. Like almost all road engineers on U.S. railroads, their earnings were based on the number of miles worked in a given pay period. However the number of hours required to cover a given number of miles varies greatly among different runs in their district, For example, some 300-mile runs can almost always be completed in six hours, while some 150-mile trips usually take more than 10 hours. Furthermore, some jobs generally offer a quick return trip, while others usually entail a two-day absence from home. Hence, the present compensation system creates a strong incentive to try to avoid undesirable jobs and to work as much as possible on those that bring maximum pay for minimum hours. This leads to "call dodging" (taking the phone off the hook or letting it go unanswered at the time an unwanted job is expected to be called) and "sharp shooting" (other manipulative practices intended to secure desirable jobs and/or avoid unwanted ones). The result is a situation that provokes cheating and conflict, especially when a terminal is very busy and many employees are working more than they desire.

The group estimated that a majority (about 60%) of the local membership actually preferred the heavy workload because it allowed them to earn up to about $1800 a week. However, a substantial minority felt that the fatigue and disruption of relationships with their families were not worth the extra money they were earning. They noted that their colleagues who had transferred to Amtrak had given up ten to fifteen thousand dollars a year in earnings for a regular five-day-week job, but were happy with the change. Several members aspired to certain assigned jobs that would guarantee them shorter, regular hours but lower income, but figured they would have to wait for years because of the small number of such positions.

In the other two focus groups, members expressed general satisfaction with the amount of work, which generally averaged eight to ten round trips per month or 40 to 50 working hours per week (70 to 75 hours per week away

from home). No one voiced strong objection to the number of hours or miles worked. Every man who commented said that the trend toward more inter-divisional runs had tended to reduce hours worked, thus improving the quality of his life by allowing him more time with his family.

Goals for changes in this area include:

(1) Maintaining pool sizes sufficient to insure that no one is compelled to work excessive hours. This goal is generally met, but better planning to anticipate problems and greater flexibility in converting trainmen to engineers are needed.

(2) The trend toward longer pools is helpful and should continue.

(3) Limitations on maximum number of hours worked per month in combination with a fixed base salary were regarded as desirable.

(4) Penalty payments are needed to insure that "dead" crews are not left waiting hours for transportation to their destinations or places of rest.

3.3 Waiting and Commuting Time

Several engineers complained that long commutes are another major contributor to fatigue, because of all of the consolidations and reductions in employment that have taken place in recent years. Some train crew members are now working out of terminals more than a hundred miles from their homes. A few were mentioned in the focus groups who live more than two hundred miles from their terminals, and one lives about six hundred miles away. Most of these long-distance commuters were trainmen, not engineers.

Such employees frequently arrive at work ready to sleep even though they have had eight or ten hours off duty. They spent a good deal of their time on the job sleeping,

except when switching or other activities required their participation. Over a period of years, these problems should be reduced as employees relocate, but there was general apprehension that future mergers and reorganizations could create new disruptions.

3.4 Equipment Problems

At one of the focus groups, inadequate maintenance of locomotives was cited as a major contributor to fatigue not only because of its impact on schedule reliability, but also because the equipment failures directly caused increased work load and physical discomfort. These engineers said they frequently had to work with bad-order equipment on locomotives, including dynamic brakes, speedometers, telemetry devices and counters. The most common defect was the lack of a working wheel-revolution counter (needed to tell when the rear end of the train has cleared a specific point, as when stopping on a siding) resulting from the input connection never having been installed. Engineers were particularly outraged that they would be held to blame for an accident caused by this faulty equipment even when they had filed bad-order reports. They noted that some managers were ignoring these reports in order to stay within their budgets.

A second major source of fatigue for the engineers in this group was the extremely hot weather characteristic of the districts in which they worked. Although their labor agreements required that all locomotives be equipped with air conditioners, they were not kept in good repair. Participants estimated that only 10 to 20% of their runs were made with a working air conditioner in the lead cab. As a result they often worked in temperatures above 100 degrees for many hours and suffered great fatigue as a result.

Some of the inoperative coolers were thought to be the result of sabotage by round-house crews. Labor agreements require that if one unit in a consist has a working

air-conditioner, that unit must be placed on the point by the hostlers. However shuffling the consist order and/or turning units on the "wye" can easily take 30 to 60 minutes. Hostlers find it much quicker to disconnect a wire or pull a fuse so that no units have a working A/C and they can avoid reordering the consist. By agreement, engineers can put the unit with the working A/C on the point, but doing so delays the train and incurs the displeasure of the dispatcher, who may punish the engineer later.

In each of the focus groups there were complaints about a variety of less-common equipment problems which can contribute to increased workload and fatigue. These included: speed restrictions related to special cars; glare from rain and snow reflecting from high-mounted headlights on some locomotives and new equipment installed on engines without providing adequate instruction and/or simulator training. One incident was described in which a crew was ordered by a supervisor to take a train which was unsafely built. There was anger about managers' lack of concern for safety in such situations.

As goals for improvements in these areas, the engineers suggested that:

(1) Locomotives should be maintained or replaced to bring power reliability up to 98 or 99%. In particular, air-conditioner maintenance should be mandatory in hot climates.

(2) Stronger regulations and/or agreements are needed to make certain that engineers are not compelled to operate trains with defective equipment or which are poorly built. Rights of refusal comparable to an airline pilot's were sought.

3.5 Inadequate Sleep at Away-from-Home Terminals

There was also general dissatisfaction expressed because of inability to get sufficient rest at the away-from-home

terminal. Eight hours off duty seldom translates into more than four hours sleep because of the time required to get to a motel and eat, coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts.

In two of the groups, the rest facilities provided by the railroad were roundly criticized for their unsuitability as places to sleep. Some were temporary buildings ("modules") located at yards. In these noisy locations, their thin walls and inadequate air-conditioners resulted in very poor quality sleep. Frequent instances of being awakened by the staff were recounted, which were the result of the staff having failed to keep track of which person was in which room.

Sleep quality was often degraded at away-from-home terminals by noise and other unpleasant environmental conditions in the motels contracted by the railroads. Rooms adjacent to pools or parties were a common complaint. Failures on the part of motel managers to inform house keeping staff that railroaders were trying to sleep in the daytime were another.

Attempts to sleep out of synchronization with ones circadian rhythm were also a frequent cause of poor-quality sleep.

Suggested improvements in this area were:

(1) Crews should always be allowed the option of claiming ten or twelve hours rest whenever they feel they need it. At present some railroads permit these requests for some employees, but the practice should be universal.

(2) Management should pay increased attention to the motels contracted to provide away-from-home rest. These motels should be required to provide blocks of rooms for railroaders away from pools and function rooms. Housekeeping services should be timed to avoid interfering with sleep. In some in-

stances, the motel is grossly unsatisfactory (filthy, located near an airport runway or rail yard, etc.) and the contract should be awarded to another hotelier. Long-term contracts should be avoided so that the railroad can maintain some leverage to force motel managers to attend to the special needs of train crew members.

(3) Trailers and temporary buildings in yards or other noisy locations should be eliminated.

3.6 Conflicts within the Locomotive Crew

All of the engineers complained to some extent about how little help they receive from their fellow crew members. In one group, most said they hardly ever got any relief. Numerous examples were cited of conductors and brakemen who slept for hours and refused to help the engineer in any way.

Some engineers strongly favored converting conductors and brakemen to co-engineers with the expectation that as such they would drive the train for a substantial portion of each trip and actively assist the engineer in dealing with various other tasks.

3.7 Conflicts with Dispatchers

There were complaints about errors made by dispatchers in each focus group, but they were reported to be much more frequent in one group. This group's railroad had recently reorganized dispatching functions in a way that left many persons assigned to a center when they would rather be somewhere else. Dispatchers are reported to be experiencing an unusually high level of stress, as evidenced by fist fights and domestic violence among the staff. This situation, coupled with the dispatchers' dissatisfaction about receiving only about half as much income as the engineers, has resulted in numerous instances in which dispatchers deliberately delayed trains simply

to punish the engineers. Numerous cases of being stopped or held in a siding for an hour for no apparent reason were reported. Meets were often poorly coordinated i.e., one train was put in a siding much earlier than necessary or desirable for efficient operation. These errors caused delays and introduced additional uncertainty into the schedule.

In this group, certain disaptchers were reported to delay trains for no legitimate reason, but rather to punish engineers who had incurred their displeasure. Management was described as unable to fire these dispatchers because it was so difficult to attract anybody to fill the positions.

Difficulty in reaching dispatchers by radio was reported by most of the engineers in all of the groups. In these situations they felt anxious because they could not find out what was going on. Some of these difficulties were due to equipment faults or poor-reception conditions, but some were known to have resulted from dispatchers turning down the volume on their radios so that they could do other work without being disturbed by engineers.

Most of the sources of conflict with callers would be eliminated if there were a requirement for a binding advance notice of call (eight or ten hours with penalty for significant changes). Engineers would also like:

(1) Option to mark off at least one week-end per month without penalty.

(2) Option to mark off two days per week without penalty, but limited to low traffic days, typically Mondays and Tuesdays.

(3) Efforts by management to attract more competent employees for crew-calling positions.

APPENDIX G

U.S. Department
of Transportation

Federal Railroad
Administration

ENGINEMAN STRESS AND FATIGUE: PILOT TESTS

Office of Research and Development
Washington, D.C. 20590

June 1992
Final Report

ENGINEMAN STRESS AND FATIGUE

1. INTRODUCTION

This Task Order involved the observation of the effects of fatigue on the train handling performance and vigilance of a limited number of locomotive engineers while operating the Federal Railroad Administration (FRA) Research and Locomotive Evaluator/Simulator (RALES). Subjects operated on an hourly cycle of 12 work-12 rest-8 work as "normal" cycle followed by an hourly cycle of 12W-8R-8W the following week as a "fatigue" cycle.

1.1 THE STUDY

During the months of December, 1991 and January, 1992, four certified train service locomotive engineers were individually oriented to the operation of the RALES FRA Class 1 simulator at the IIT Research Institute (IITRI). The subjects were also given a sleep/work diary to keep.

Approximately one week after the orientation, each subject reported to IITRI, handed in the completed sleep/work diary and commenced to perform repeated simulated runs of approximately 1½ hours duration over a 12 hour period. There were two territories, and these were alternated in the same order for each subject. An observer was present, in the locomotive cab, during each run.

Scoring of various aspects of train handling were collected as well as the observer's run observation notes. Following the 12 hour period, the subject was taken to a nearby place of rest and not disturbed until 10 hours later, when a "crew call" was made to inform the subject to report in 2 hours. Within two hours of the call, the subject returned to the RALES facility and performed the same schedule of runs followed during the previous day. Scoring of train handling, observer notes and an exit

interview were collected. The subject was given a new work/sleep diary to keep.

Approximately one week later, the subject returned to repeat the two day sequence with the exception of the rest period being only 8 hours in duration with the "crew call" coming after the 6th hour. All other conditions and data collection remained the same as those used in the first experimental period.

1.2 OVERVIEW OF RESULTS

Subjects were observed to doze off while running during the experiment and were able to report this fact as well as observe that they could have made a serious mistake due to tiredness. They produced performance errors during the study which were potentially hazardous, particularly in regard to signaling for crossings and observation of speed limits.

As a group, the subjects were not found to perform any differently during the second day of the normal (12-12-8) schedule than they were during the second day of the fatigue (12-8-8) schedule. While subjects were more likely to indicate during exit interviews that they were more fatigued at the end of the fatigue schedule, they were more likely to indicate they had dozed off during the normal schedule. Observers tended to corroborate these reports.

There is a possible explanation for the lack of difference between the normal and fatigue schedules. The sleep records of the subjects were plotted and found to be atypical in comparison with those of non-engineer persons. It seems possible that the controlled, low interruption rest periods of the study were, in effect, superior to the rest normally attained by the subjects. This is not to say, however, that the subjects failed to demonstrate dangerous levels of fatigue during the study.

There was no clear deterioration in train handling performance between the first and second days (in either the normal or fatigue schedules). This is not to say, however, that the engineers performed without error. Speed limit infractions, failures to blow the horn for crossings, rapid throttle changes and excessive train forces were evident for each of the subjects. While aggressiveness (heavy applications of throttle and brake) in train handling without a concomitant reduction in elapsed time was evident, this behavior also was not related to schedule or day. There did not seem to be a correspondence between bouts of dozing as noted by observers and runs in which an increased number of errors occurred. It may be that a more time sensitive method of performance evaluation would reveal a relationship between the condition of observed dozing and train handling errors.

Core body temperature was recorded at the request of The Volpe National Transportation Systems Center (VNTSC) for each of the subjects throughout the two experimental periods. Complete temperature data were not recorded for each subject due to body mass of subject, equipment failure, or possible operator error. Those data which were collected provided traces of temperature fluctuations which appeared to agree with subjects' scheduled sleep periods during the study. The data were forwarded to VNTSC for analysis. A fitness for duty test (*Synwork*) was also administered at various periods during the study at the request of VNTSC. The *Synwork* results were reviewed at IITRI and showed progressively increasing total performance scores which would seem indicative of practice effects over day one versus day two results:

	Error/ Mile	Attack	Elapsed Time	No. of Runs
Rochelle District:				
Day 1 Normal Schedule	0.42	1108.50	116.00	8
Day 2 Normal Schedule	0.46	1055.43	111.71	7
Day 1 Fatigue Schedule	0.37	1101.45	108.45	11
Day 2 Fatigue Schedule	0.40	1084.75	110.75	6
Davis Junction District:				
Day 1 Normal Schedule	0.67	1193.63	122.13	8
Day 2 Normal Schedule	0.60	1255.75	125.00	4
Day 1 Fatigue Schedule	0.64	1236.25	122.00	8
Day 2 Fatigue Schedule	0.66	1219.50	122.75	4

Since there were differences in engineer performance between first days and second days for each of the runs, a statistical test called the "t test" was used to determine the extent to which differences between days could have happened by chance alone. In the case of the current study, it was decided that any difference which could have occurred by chance 5 times in 100 or less would be considered significant. The selection of the .05 significance level is arbitrary, but consistent with research of this kind.

Two constraints which apply to the t test are number of samples (degrees of freedom) and expected direction of difference (one vs. two tailed). There were sufficient degrees of freedom to calculate the difference between pairs of means (t test) for each of the performance criteria. No test had a significant result at or beyond a .05 (2-tailed) level.

6. DISCUSSION OF RESULTS

No differences were found in subject performance between the "normal" and the "fatigue" schedules. One possible reason for the failure to find differences was that both the normal and the fatigue schedules of the study inadvertently provided the subjects with an assured time at which they could expect to sleep. The sleep/work diaries for the subjects indicated a history of adequate

sleep in terms of hours, but irregular patterns for when that sleep would occur. Another point which needs to be made is that the "normal" schedule of the study did not necessarily describe an optimal working condition. Twelve hours of work followed by 12 hours of rest resulted in a deterioration in train handling on the following day.

As indicated earlier, the subjects seemed to have incidents of nodding or inattention without regard to schedule or time of day. Subject S9431 did show an increase in observed incidents of nodding or inattention during a period in which sleep would normally have been more likely, but posted a relatively high performance rate for the particular run in which the events took place. One plausible explanation is that engineers do have disrupted sleep patterns (see sleep histories section) which increase the chances of decreased attention during periods in which relatively low levels of operational performance are required.

The subjects indicated, and the observers noted a marked tendency to doze in those instances where few control actions were required of the engineers. Had unanticipated events such as signal changes a short distance from the head end, torpedoes, locomotive malfunctions or the like taken place during periods of low control demands, the error rates might have reflected a higher level. A reading of FRA accident reports involving sleep often reveal situations which might be characterized as low control demand periods. While safe train handling of heavy freights takes considerable skill, the task does differ from highway vehicle driving in that there are periods in which the task does not include a motor component to prompt attentiveness or threaten immediate disastrous consequences arising from inattention to control.

There is further support for the "low demand" explanation: The Davis Junction run did not differ substantially in terms of terrain from the Rochelle run; it did differ,

however, in terms of a greater number of slow orders and crossings. Subject engineers generally reported that it was easier to remain awake on the Davis Junction run, yet the engineers' error rates per mile for that run were often equal to or higher than the rates for Rochelle. A conclusion could be drawn that the subjects knew if they were dozing off, but were not necessarily aware of the effect fatigue was having on their mile by mile performance. Fatigue induced error and sleep deprivation induced accidents may, in fact, not be polar points on a single continuum. Since the train handling deterioration exhibited by the subjects was not trivial, it may be necessary to think of fatigue and sleep deprivation (or circadian shift) in distinctly separate ways.

As indicated earlier, the sleep patterns of the engineers were markedly different from that of non-engineers. It may be that the enforced rest regimen of the study with a comfortable room away from home at a predictable time where no other engineers or rail crew members were nearby constituted a rest period superior to that attainable in "real life." Had the sleep been more disrupted, or the schedule of work more irregular (such as extra-board engineer's experience of 6 hours of work, 6 hours of rest, 6 hours of work), the results might have been more extreme. Two of the engineers did informally comment that they felt better on the second day of a run than the first, even when they were on the "fatigue" schedule of an 8 hours rest period. Real world engineers often do not know when they will be called and cannot, as a consequence, make as much of rest periods as the subjects of the current study were able to do.

The subjects did make a number of comments about the locomotive cab environment. The study did not use noise or ambient temperature levels considered by engineers to be fatiguing. Additionally, the study did not take place during a period of time in which both subject

engineers and virtually all correspondent engineers have indicated as a particularly difficult time, i.e., just at dawn. It does remain to be seen if this time is relative to time at a particular location on the planet's surface, or an actual characteristic change in the level of ambient light. In the current study, the engineer subjects did not run at the daybreak period but did tend to show elevated error per mile rates when they undertook runs during the period between 0900 and 1000 hours which has also been characterized as a period of drowsiness.

Given the results of other research in the area of fatigue and sleep, one suspects no clear standard exists for an indicator of sleep deprivation or fatgue which would apply equally to all individuals. What may be hoped for, however, is the definition of a borderline of conditions past which a significant number of individuals become dangerously impaired. The subjects of the current study were willing to admit in the exit interview that they had either dozed or could easily have caused an accident due to tiredness at some point during the experiment.

APPENDIX H

FOCUS GROUP REPORT

Federal Railroad Administration
Customer Service

May 1995

Introduction

This report outlines responses collected during focus sessions with field and regional personnel of the Federal Railroad Administration (FRA). It is based upon questions designed to provide information on benchmarking, safety programs, regulatory reform, and organizational culture.

The focus groups were conducted in each of the tight regional offices beginning April 13 and concluding April 20. Approximately 20 FRA employees representing a broad cross-section of the field and region participated in each three hour session. At the completion of all the sessions, a total of 168, or 42% of all field and regional staff had contributed their ideas.

The same seven questions were posed to each group—3 benchmarking questions, 3 questions on safety programs, and 1 question about regulatory reform. All responses were recorded on-site during the sessions. An organizational culture survey was also administered at the conclusion of each session.

This report is organized by question groupings. Verbatim statements extrapolated from participant comments are arranged by dominant themes. Indications for action are offered at the conclusion of each section where appropriate.

This synopsis should be a useful guide and tool for the Customer Service Implementation Team in their search for "best in business".

Section II
SAFETY PROGRAMS

Name 3 key things FRA should consider in evaluating our Safety Program.

Consistency

- Each of the regions do things differently. There needs to be consistency and standardization between the regions.
- Interpretations vary from inspector to inspector. Make sure everyone is doing the same thing in interpretations.
- Railroads shop around for the answers they want because they get different interpretations.
- The regulations should be applicable to what we see every day, like hand brake, when the engine is left unattended, or a shove move.
- Specialists should be taught by one person so there is consistency.

Safety *Assurance* versus *Enforcement*

- Are we allowing our inspectors to be as thorough and persistent in insisting on compliance. Enforcement is not being emphasized. Identify what the safety program/plan is in the field. Do we want enforcement, or what?
- We are worried that with team inspections the railroads will know how long between the next inspection and will lay off their plan until we come back.

APPENDIX I

OHIO RAIL SAFETY INITIATIVE

Department of Transportation

[Logo]

United States of America

FEDERAL RAILROAD ADMINISTRATION

Office of Safety

Region 2

November 1994

* * * *

Still, several safety sensitive issues were identified which the safety iniative team believes would reduce the potential for train accidents. These issues follow:

- Under the present limitations of the Hours of Service Act, railroad employees engaged in or connected with the movement of trains (train and engine crews) may work up to 112 hours in any seven day week. Although FRA does not believe that many workers reach this total, it does believe that 80 to 90 hour work weeks are not extraordinary.

  Under the Law, after a tour of duty of up to 11 hours and 59 minutes, train crews must be given an eight hour off duty period. Within this time frame, workers must travel home, eat, bathe, sleep, and return to their reporting point. This routine may continue for an in-

definite number of days without the worker having the legitimate opportunity to have a day off work. FRA believes that many employees are seriously fatigued. Conrail recognizes the problem but may often be faced with the option of granting workers a day off at a cost annulling guaranteed service trains.

FRA also notes that Conrail has been conspicuously unsuccessful at limiting worker's hours of duty to the twelve hours prescribed by law. Over 75 percent of the violations filed by FRA inspectors in Ohio have occurred on Conrail. FRA Region 2 is responsible for enforcement across a territory that covers all or part of five Conrail Divisions. More than one-half of the violations filed in the Region against Conrail have involved the Dearborn or Pittsburgh Divisions. While almost all of this excess service involves waiting for transportation rather than operating trains, FRA believes that other railroads in Ohio, and other divisions on Conrail have more successfully addressed the problem.

Conrail is apparently concerned with the present work schedules as well. They have responded with the most massive hiring programs for engineers and conductors in the railroad's history.

Training for these new employees does not follow traditional railroad on-the-job skills development. Rather, it is a combination of formal classroom and on-the-job experience with the goal of producing a qualified engineer within six months.

While FRA found few issues with the program or it's results, FRA does believe that inexperience creates it's own subset of issues. FRA believes that a combination of inexperienced new workers, coupled with fatigued experienced workers, makes it critical that management closely monitor performance. Conrail's vehicle for this purpose is the operational testing and inspection program.

Our team's review of performance records disclosed that the Dearborn Division came closest to meeting corporate goals. The Pittsburgh Division did not do as well. The issue was considered sufficiently important that an interim meeting was conducted with the Division Manager. To his credit, the Division Manager altered procedures to make the program more proactive almost immediately. FRA will monitor progress.

- The increased traffic levels on the Chicago Line have corresponding increased radio traffic. This radio traffic level nearly exceeds the capacity of Conrail's existing radio network, particularly in metropolitan areas. While the team commends Conrail for its recent reassignment of radio channels to reduce the problem, it believes that more needs to be done. Short term, Conrail can reduce a portion of the traffic through operational testing to ensure that workers use the channels that they are assigned, and that non-essential use of the radio is minimal. In the longer term, Conrail needs to find ways to eliminate radio "bleed-over", control interruptions from talking mechanical devises and, ultimately, secure more secure and accessible communications.

H. *FUTURE ACTIONS*

As is usual and customary, FRA will conduct a follow-up to monitor the railroads actions and responses to our concerns. This normally occurs within six months. A reduced field staff may be used if appropriate. For reasons which were identified earlier in the summary, FRA is particularly concerned with the quality and depth of Conrail's program of operational tests and inspections.

FRA is also concerned with the railroad's slow progress improving the quality of hazardous materials documentation for TOFC/COFC limited quantity shipments. Progress will be monitored to insure sustained improvement.

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QUESTION PRESENTED

Is time spent waiting for deadhead transportation by a train crew, which has been relieved of all duties, time on duty within the meaning of the Hours of Service Act, 49 U.S.C. § 21103(b)?

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In the Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE RAILROAD RESPONDENTS

STATEMENT OF THE CASE

The Hours of Service Act ("HSA"), originally enacted in 1907, limits the maximum number of hours that railroad employees can be continuously on duty while engaged in

the operation of a train.[1/] This case resulted from the 1992 decision of the Federal Railroad Administration ("FRA") to adopt a new nationwide interpretation of the HSA. This new interpretation reversed the 85-year practice under the HSA of *not* counting as time on duty any time that a train crew, which has reached the end of its tour of duty and has been relieved from all duties, may spend waiting for transportation back to a terminal. This 85-year history was a basis upon which the industry's operating and crew scheduling practices have developed.

The HSA currently limits the maximum hours that a train employee can be continuously on duty to twelve hours.[2/] 45 U.S.C. § 62(a) (recodified at 49 U.S.C. § 21103(a)).[3/] After reaching the maximum, an employee cannot again be engaged in the operation of a train until after receiving a statutorily required minimum rest period

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1/ The Railroad Respondents are the nine largest railroads in the United States, The Atchison, Topeka and Santa Fe Railway Co., Burlington Northern Railroad Company, CSX Transportation, Inc., Consolidated Rail Corp., Illinois Central Railroad Co., Norfolk Southern Railway Co., Norfolk and Western Railway Co., Southern Pacific Transportation Co. and Union Pacific Railroad Co.

2/ Prior to the 1969 amendment of the HSA, the maximum was 16 hours.

3/ At the time this litigation commenced, the HSA was codified at 45 U.S.C. §§ 61-65 (1988). Congress since recodified the HSA at 49 U.S.C. §§ 21101-07 as part of its recodification of federal transportation statutes. Pub. L. No. 103-272, 108 Stat. 745 (1994). Although the recodification changed some statutory language, Congress did not intend to make any substantive change to the HSA. H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). In order to parallel the unions' brief, this brief will cite to the recodified version of the Act, unless the context requires otherwise.

of up to ten hours. Most train assignments are completed within the twelve-hour maximum. However, because of the many variables that affect train operations, a crew occasionally cannot reach its scheduled destination within twelve hours. J.A. 100. When it appears that a train crew will not be able to complete its assignment before reaching the maximum, the railroad instructs the crew to park the train at a safe location before reaching the twelve-hour limit. The crew is then released by the railroad from any further duties and, in the industry lingo, is considered a relieved or "expired" crew, *i.e.*, it cannot be given any further duties until after receiving the minimum hours of rest mandated by the statute. 49 U.S.C. § 21103(a). The relieved crew is transported, by taxi or company vehicle or by riding on a train (but not as the crew), to a terminal. J.A. 99-100, 114-15, 122-23. The transportation, by whatever means, of a relieved crew that is not engaged in train operation is referred to as "deadhead" transportation. A fresh crew is sent to continue the train's journey to its scheduled destination. The relieved crew may be instructed to wait for its deadhead transportation on the stopped train or at some nearby location, such as a restaurant. J.A. 100-01, 123-24. If there is a wait, the railroads try to minimize it as much as possible. J.A. 101, 115, 124.[4/]

From 1907 until amended in 1969, the HSA classified time as either on-duty or off-duty. Deadhead transportation was considered time off duty. The time

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4/ The train crew is still paid while waiting for deadhead transportation, even though it has no duties to perform. J.A. 104 (¶ 3); *see also, e.g., Hours of Service Act Amendments of 1969, Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 100 (1969) (testimony of W. S. McGuire) [hereinafter *1969 Hearings*].

spent waiting for deadhead transportation by an expired crew likewise was considered off-duty time. J.A. 98, 114, 118, 121; *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437, 444 (7th Cir. 1994) (en banc). Not only was the statutory maximum intended to foster safety, it also provided the railroads with the ability to utilize crews right up to the twelve-hour limit where the practicalities of railroading so required, without fear of violating the HSA. Because time waiting for deadhead transportation by a relieved crew did not count toward the statutory maximum, if it appeared that a crew would expire before completing its run, the railroad could instruct the crew to park the train and relieve the crew from any further duties before it reached the HSA limit. Railroads schedule thousands of train crews every day.[5/] By utilizing crews right up to the HSA limit when necessary and then relieving them from duty when the limit was reached, the railroads were able to apply the Act's requirements in a straightforward manner.

In 1969 the HSA was amended to add a third category of time into which the deadhead transportation of expired crews was placed. This period, which came to be known in the industry as "limbo time," counted toward neither the maximum time on-duty nor the minimum amount of rest. 45 U.S.C. § 61(b)(3)(C) (recodified at 49 U.S.C. § 21103(b)(4)). For nearly 23 years, from 1969 until the FRA's 1992 re-interpretation of the Act,[6/] time spent

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5/ For example, Burlington Northern alone utilizes on average more than 2000 different crews each day. J.A. 113 (¶ 4).

6/ The HSA was originally administered by the Interstate Commerce Commission ("ICC"). In 1966, Congress transferred all powers and duties related to the HSA to the Secretary of the then newly-created Department of Transportation. 49 U.S.C. § 1655(e)(2). The Secretary later delegated his authority to the FRA, an agency within Transportation. 49 C.F.R. § 1.49(d).

waiting for deadhead transportation by a relieved crew was treated like time spent in such deadhead transportation, *i.e.*, as limbo time. J.A. 99 (¶ 7), 103 (¶ 5), 114 (¶ 6), 118 (¶ 5). Treatment of waiting time as limbo time was consistent with its prior treatment as time off-duty. Either way, waiting time was not counted as time on duty attributable to the maximum hours of service.

This administrative treatment of time waiting for deadhead transportation by a relieved crew changed after the unions which represent most locomotive engineers, the Brotherhood of Locomotive Engineers ("BLE"), and most conductors and brakemen, the United Transportation Union ("UTU"), sued the FRA in 1990. The unions argued that this waiting time period should be time on duty rather than limbo time. In the first decision on this issue since the 1969 Amendments, the Ninth Circuit agreed in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

The Chief Counsel of the FRA advised the railroad industry by letter dated October 28, 1992 that the Ninth Circuit had rejected the FRA's longstanding interpretation of this waiting time as limbo time. J.A. 73. Although the FRA did "not agree with the court's rationale," the agency advised that, effective January 1, 1993, it nevertheless would apply the Ninth Circuit's holding nationwide "in the interest of uniform application of the Hours of Service Act." J.A. 75. The FRA therefore instructed railroads that henceforth they were to treat time waiting by a relieved crew for deadhead transportation as time on duty and report any waiting time beyond the 12-hour maximum as excess service under the HSA. By adopting this interpretation, the FRA made illegal the way railroads had been operating for more than 85 years. Failure to comply with the FRA's new interpretation would subject railroads to civil and criminal penalties, not only if they utilize

employees in excess of the maximum hours allowed by law, but also if they fail to keep records of such excess service, which are audited by the FRA.[7/]

The FRA soon thereafter issued memoranda to various railroads advising how the FRA's new statutory interpretation was to be applied. J.A. at 78-91.[8/] The memoranda expanded on the FRA's October 28, 1992 letter, stating, for example, that this "[w]aiting time ends when the expired crew ceases to be *the crew of the train*, which occurs when the transportation that will carry them back to their point of final release arrives." J.A. 79, 86. Under the FRA's new statutory interpretation, employees were deemed to be the "crew of the train" even if they unquestionably had been relieved of all duties by the railroad. Indeed, the FRA considered them still to be the crew of the train even if they had left the train and were waiting at a nearby cafe for their transportation back to the terminal, J.A. 86-87 (Ex. B), or if their relief crew had already departed with the train, J.A. 89 (Ex. G).

The FRA's new interpretation of the HSA caused the railroad industry severe operating difficulties and imposed

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7/ Violations of HSA are subject to civil and criminal penalties by virtue of 49 U.S.C. §§ 21301-04, 21311. The excess service of each member of a train crew, typically two or three employees, is considered by the FRA a separate violation. *Id.* § 21303(a)(1). Failure to report excess service constitutes a separate and additional violation. 49 C.F.R. §§ 228.19, 228.21 (1994).

8/ The Railroads filed their first petition for review on March 2, 1993, in the event that these memoranda would be construed as agency action. The Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972, changed the procedure for seeking judicial review of FRA actions under the HSA. Such actions had to be appealed within 60 days of final agency action to an appropriate circuit court of appeals. *See* 28 U.S.C. §§ 2342, 2344.

significant costs on it. In a petition filed with the FRA on March 26, 1993, the Railroad Respondents explained these problems and stated that there was no legal or factual basis for the FRA's new nationwide reinterpretation of the HSA. J.A. 125. The Railroads submitted affidavits of their operating officials explaining the historical application of the HSA to this waiting time and the adverse impact on railroad operating practices and service from the FRA's new interpretation. *See, e.g.*, J.A. at 99-100 (¶ 9); 105-06 (¶¶ 6-8); 116 (¶ 9); 119 (¶ 7); 122-23 (¶¶ 8-9).

The unions, which elected not to participate in the FRA proceedings on the Railroads' Petition and therefore submitted no counter-affidavits or argument,[9/] now claim in their brief to this Court that railroads can adjust to the new interpretation by implementing better advance planning and by having transportation ready to meet relieved crews. Pet. Br. at 7-8. The unrebutted affidavits of the Railroads showed, however, that the problems created by the new interpretation cannot be solved so easily. The many variables affecting train operations often do not allow trains to be stopped at locations easily accessible to the taxi cab or van sent to pick up the expired crew. Also, a derailment, weather-related or other unavoidable delay may have a ripple effect on several trains at once, causing all of their crews to expire under the HSA before reaching their destination. Transportation will not be immediately available to reach all those crews before the 12-hour limit, especially in rural areas where most railroad tracks are located. Even where deadhead transportation is readily available, further delays can cause the train crew to expire and park its train before reaching

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9/ The unions stood by mute, even though the Railroads served a copy of their petition to the FRA on the BLE and UTU, as well as on their attorney.

its intended rendezvous with the deadhead transportation vehicle. *See, e.g.*, J.A. 119 (¶ 7), 123 (¶ 9).

As explained, before the FRA re-interpreted the HSA, railroads could meet these kinds of daily contingencies with confidence that they would not violate the HSA. All a railroad had to do was stop the train and relieve its crew from duty. However, as a practical matter, railroads could no longer utilize crews up to the twelve-hour maximum allowed by Congress under the FRA's new interpretation. The requirement to build in additional time to allow for deadhead transportation to meet expired crews effectively reduced the maximum hours that crews could operate trains. The railroads already had to take into account whether a crew could complete its assignment within the twelve-hour limit. Now, they also had to try to relieve a crew sufficiently in advance of reaching that limit so that deadhead transportation could be contacted, dispatched and meet the relieved crew. J.A. 99-100, 105, 116, 119, 123.

On April 8, 1995, while the Railroads' Petition was pending at the FRA, the FRA published a *Federal Register* notice amending its HSA policy statement contained in the Code of Federal Regulations to reflect its new interpretation and enforcement policy regarding waiting time. J.A. 158-67. The FRA repeated that, while it did "not agree with [*Skinner*'s] legal rationale, we have decided to accept its decision and treat it as binding." J.A. 160. The FRA advised that "awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly . . . ." J.A. 161. The FRA also reminded affected parties that the civil penalties for violation of the HSA had been increased and that, not only railroads, but their officials and employees, were

subject to civil and criminal penalties for violations of the HSA. J.A. 164-65.[10/]

On May 19, 1993, the Railroads supplemented their Petition to advise that the FRA's new interpretation was resulting in many additional instances of service in excess of the statutory maximum. Despite the Railroads' efforts to comply with the new interpretation, they were simply unable to do so in all circumstances. J.A. 122-133. In the first three months of 1993 alone, after the FRA's new interpretation took effect, the Railroads reported more than twice the excess service under the HSA as they had for all of 1991 and 1992 combined. J.A. 128-129, 133. Even though these instances represented a relatively small number of the thousands of train crews utilized each day, the Railroads explained that the FRA's new interpretation exposed them to hundreds of thousands of dollars of liability.[11/] Again, the unions did not respond to the Railroads' Supplement or otherwise seek to participate before the FRA.

Because the FRA's *Federal Register* notice was the first formal agency action establishing a new nationwide interpretation of the HSA, and the FRA had not yet acted on the Railroads' Petition, the Railroads filed a protective petition for review of the FRA's amendment of its interpretative and enforcement policy on June 7, 1993. J.A. 168-73. The FRA eventually denied the Railroads' Petition on July 1, 1993. J.A. at 174-80. The Railroads appealed that denial within the 60-day period set forth in

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10/ Violations of the HSA are punishable by fines of up to $10,000 each; fines of up to $20,000 may be assessed for violations arising out of gross negligence or for a pattern of repeated violations. 49 U.S.C. § 21303.

11/ This potential liability has since increased into the millions of dollars.

28 U.S.C. § 2344, J.A. 181-86, and the Seventh Circuit consolidated the three appeals by orders issued June 24 and July 21, 1993. J.A. 22, 23.

A divided panel held that, although it would have decided the case differently were it writing on a clean slate, it felt compelled to follow the Ninth Circuit's decision. *Atchison, T. & S. F. Ry. v. Peña,* 29 F.3d 324 (7th Cir. 1994). The Seventh Circuit granted the Railroads' petition for rehearing en banc and reversed that panel decision. 44 F.3d 437 (7th Cir. 1994) (en banc). A unanimous court stated that, "[m]indful that the purpose of the Act and its amendments is safety in operating trains, we hold that time spent waiting for deadhead transportation is not time on duty, but limbo time." *Id.* at 443. In view of the Seventh Circuit's en banc decision, the FRA returned to its pre-*Skinner* application of the HSA, except in the Ninth Circuit. Only the unions still argue that time waiting for deadhead transportation by a crew, which has been relieved from all duties, should be counted as time on duty.

SUMMARY OF ARGUMENT

This case presents a single straightforward issue of statutory construction--whether the time spent waiting for deadhead transportation by a train crew, which has been relieved from all duties at the end of its tour of duty, should be counted as "limbo" time or as time on duty for purposes of the HSA. Contrary to the unions' extra-record arguments on brief, this case does not involve any issue where such a train crew has been given duties to perform while waiting on the train for deadhead transportation to arrive.

The Seventh Circuit's interpretation of this waiting time to be limbo time is clearly compelled by and is consistent

with the language and structure of the statute. The HSA defines "time on duty" as "[t]ime the employee is engaged in or connected with the movement of a train . . . ." 49 U.S.C. § 21103(b)(2). A train crew which has been relieved of all duties, will not again be called upon to operate a train until receiving the rest period mandated by the HSA, and is merely waiting for deadhead transportation to arrive is obviously no longer "engaged in or connected with the movement of a train." In contrast, the unions' suggested interpretation is contrary to the language and structure of the Act. Employees would be treated as on duty even when they unquestionably have no duties. Consequently, the hours of service that crews could be utilized would be effectively reduced below the maximum allowed by statute.

The Seventh Circuit's interpretation is also consistent with the safety purpose of the HSA. Treatment of waiting time, which the Railroads try to keep to a minimum, as limbo time does not extend the time that a crew can be continuously on duty; the statutory limit remains twelve hours. Once employees have been relieved at the end of their tour of duty, they cannot be given new duties until receiving the statutorily mandated rest period. Because time waiting for deadhead transportation, whatever its duration, also does not count as time off-duty, that rest period does not begin to run until after the expired crew reaches its terminal.

Contrary to the unions' argument, the Seventh Circuit's interpretation is consistent with the legislative history and consistent application of the HSA. That history shows that Congress has been mindful of the practical impact of the HSA on railroad operations. For that reason, Congress has refused proposals by these unions to amend the HSA so as to overturn the FRA's treatment of waiting time as time on duty and to further reduce the maximum hours of

service from twelve to ten hours. Yet, a reduction in the maximum limit would be the practical effect of the HSA interpretation urged by the unions here.

The Seventh Circuit's decision is also consistent with appellate decisions under the HSA, except for *Skinner*, which was wrongly decided. The decisions of this Court and other appellate courts show that a crew is considered on duty only if it is actually performing duties or has been temporarily released from duty in the midst of its tour, but may be recalled at any moment. Neither circumstance is presented here.

Finally, this case does not raise "a serious safety issue" as the unions argue. The unions' concern is that train crews work long and irregular shifts. Congress, however, has already determined that a twelve-hour maximum on duty time is not excessive, and irregular work patterns are not even regulated by the HSA. The unions' safety argument highlights that they are actually making policy arguments for amendment of the Act. Such arguments must be made to Congress, not this Court. In fact, the unions' brief is simply a repackaging, sometimes verbatim, of prepared 1991 congressional testimony in support of the same proposal for amendment of the HSA that they are seeking here.

For these reasons, the Court should reject the unions' arguments and affirm the Seventh Circuit's en banc decision.

ARGUMENT

I. The Seventh Circuit's Interpretation Is Compelled By The Language Of The Statute

As this Court has observed on many occasions, "'[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *see also, e.g., K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("[T]he court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Starting its analysis with the language and structure of the HSA, the Seventh Circuit found that "the statute itself resolves this issue quite clearly." *Peña*, 44 F.3d at 443.

A. The Seventh Circuit Correctly Analyzed The Statutory Language

The HSA achieves its safety purpose by limiting the maximum hours that a train crew can be continuously on duty to twelve hours. Section 21103(b)(2) of the HSA, defines "time on duty" as "[t]ime the employee is engaged in or connected with the movement of a train . . . ." The Act also defines certain interim rest periods, when the crew is still on call and which occur before a crew has been finally relieved from duty, as "time on duty." 49 U.S.C. § 21103(b)(5)-(7). Thus, the definition focuses on the time period when an employee is responsible for the movement of a train. It is during this time that the employee must be alert and attentive.

As the Seventh Circuit found, "[t]he crew's time spent waiting [for deadhead transportation] has absolutely no impact on its ability to operate trains." *Peña*, 44 F.3d at 444. Once a train crew has been relieved from any further train operating duties, has not been given any other duties by the railroad, and is merely waiting for deadhead transportation to its terminal, that crew cannot present a safety hazard. It is no longer "engaged in or connected with the movement of a train" and cannot be recalled to operate a train or perform any other duties until after receiving at least eight (or in some cases ten) continuous hours of rest. 49 U.S.C. § 21103(a). Therefore, this waiting time is not time on duty within the plain meaning of Section 21103(b).

The Seventh Circuit's treatment of time waiting for deadhead transportation from point of duty (*i.e.*, the train) to a terminal like the treatment of that deadhead transportation (*i.e.*, as limbo time) is also logical and consistent with the structure of the Act. Before 1969, all deadhead transportation, either to or from the point where an employee would assume train operating duties, was treated as off-duty. The unions proposed that all deadhead transportation be reclassified as time on duty. *See, e.g.*, *1969 Hearings* at 9 (testimony of Al Chesser). The railroad industry opposed this change, especially as it related to deadhead transportation from the point where the crew had been relieved of all duties, because of the operating problems this would create. In particular, railroads effectively would be precluded from utilizing crews up to the maximum limit (reduced to twelve hours by the 1969 Amendments) if deadhead transportation at the end of a tour of duty were counted toward that limit. *Id.* at 134-35 (testimony of R. R. Manion).

Congress legislated a compromise by treating deadhead transportation to a duty assignment as time on duty,

because that time could affect the employee's alertness once he or she reached the train the employee would operate. However, Congress chose not to count deadhead transportation after an employee had been relieved from duty as time on duty, because of the practical problems identified by the industry that such a rule would cause and the fact that the employee would not thereafter be involved in train operation until receiving the required rest period. Instead, Congress classified it as neither time on duty or off duty, *i.e.*, limbo time. 45 U.S.C § 61(b)(3)(C) (recodified at 49 U.S.C. § 21103(b)(4)). Treating time waiting for deadhead transportation as part of such transportation carries out this legislative compromise. This waiting time is like deadhead transportation, because the crew has been relieved from all duties. Conversely, counting it as time on duty creates the same kind of practical operating problems that Congress avoided by classifying deadhead transportation from point of duty as limbo time.

Furthermore, treating time waiting for deadhead transportation as time on duty is contrary to statutory language that time on duty is "[t]ime the employee is engaged in or connected with the movement of a train . . . ." 49 U.S.C. § 21103(b)(2). The unions' statutory interpretation looks solely at whether deadhead transportation has arrived, not at whether the expired crew has any duties. This approach creates the absurd result that the crew is deemed on duty even though it is no longer on the train and is waiting in a cafe, J.A. 86-87 (Ex. B) or the relief crew has taken the train away. J.A. 89 (Ex. G).

While the Seventh Circuit began its analysis with the language of the statute, the Ninth Circuit started with case law from the early part of this century, predating the 1969 Amendments by several decades. As the Seventh Circuit

found, and as explained *infra*, Part III, the Ninth Circuit erroneously interpreted this older case law to mean that all waiting time must be counted as time on duty. *Skinner*, 975 F.2d at 1426. This erroneous reading of case law in turn caused the Ninth Circuit to analyze incorrectly the statutory language. Starting from the false premise that before 1969 time waiting for deadhead transportation by a relieved crew was time on duty, the Ninth Circuit framed the statutory interpretation issue as whether Congress intended in the 1969 Amendments to change waiting time from time on-duty to limbo time. Of course it did not, because this time period was never considered time on duty in the first place.

B. The Statutory Provisions Relied Upon By The Unions Are Inapposite

The unions argue that other sections of the HSA require that waiting time by a relieved crew be considered time on duty. They cite Sections 21103(b)(5) and (7), which deal with interim rest periods, Section 21103(b)(3), which deals with commingled service, and Section 21103(b)(1), which states that "time on duty" ends "when the employee is finally released from duty." Pet. at 8-9. None of these sections supports the unions' construction of the HSA. Even the Ninth Circuit rejected similar arguments by these unions. *See, e.g., Skinner*, 975 F.2d at 1425.

An interim period available for rest is a different period than time in deadhead transportation from point of duty (or time waiting for such transportation), as illustrated by the fact that these time periods are treated by different provisions of the HSA. 49 U.S.C. § 21103(b)(5), (7) (interim periods), § 21103(b)(4) (limbo time). Interim rest periods, by definition, occur during a crew's tour of duty

before the railroad finally relieves the crew from duty.[12/] Occurring between periods of on-duty time, the crew remains subject to recall to resume train operations as soon as the interim period is over. Congress classified interim periods as time on duty because they did not afford employees an opportunity to rest before resuming duty. *See, e.g.*, S. Rep. No. 604, 91st Cong., 1st Sess. 7 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636. In contrast, time waiting for deadhead transportation occurs at the end of a crew's shift, when it has been finally relieved from all duties. The crew is no longer subject to recall until after receiving the statutorily required rest period.

Section 21103(b)(3) also is inapposite, because it only counts as time on duty "time spent performing any other service for the railroad carrier . . . ." That section codifies case law addressing the issue of "commingled service."[13/] Normally, time spent by an employee performing service for a railroad other than train operation, such as repairing freight cars or performing track maintenance, does not count as time on duty under the HSA. If an employee is asked to perform such duties during or after his tour of duty operating a train, the time spent doing "other service" is also treated as time on duty under the HSA.[14/] Otherwise, a railroad could work an

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12/ *Webster's New World Dictionary* defines "interim" as "the period of time between." *Id.* at 734 (2d ed. 1984).

13/ *See, e.g., San Pedro, L. A. & S. L. R.R. v. United States*, 212 F. 326 (8th Cir. 1914); *United States v. Missouri Pac. Ry.*, 206 F. 847 (D. Kan. 1913).

14/ The Senate Report on the 1969 Amendments explained that this section (formerly § 62(b)) was intended to address the commingled service issue, stating that when employees "primarily engaged in or connected with the movement of a train" perform

employee involved in train operations more than twelve consecutive hours. For example, a conductor could in a single day work six hours in train service, three hours driving a truck (*i.e.*, "other service"), and then six more hours in train service, or a total of 15 consecutive hours.

The unions provide no support for their contention that a crew member who has been relieved from all duties and is merely waiting for deadhead transportation is involved in "other service" within the meaning of the HSA. The Seventh Circuit was correct that such waiting by a crew with no duties is not "other service" and, therefore, not time on duty. *Peña*, 44 F.3d at 443 & n.4. The FRA itself has never considered this waiting time as "other service." For example, the FRA did not include waiting time as "other service" in its 1977 Statement of Policy and Interpretation on the HSA, where the FRA explained commingled service. 42 Fed. Reg. 27,594, 27,596 (1977). Indeed, only five months after publishing this interpretative statement, the FRA advised the UTU that waiting time was limbo time within the meaning of the HSA. J.A. 62-64. The FRA could not have taken this position if waiting time was "other service" which had to be counted as time on duty. Nor would counting such waiting time as other service advance the safety purpose of the Act, because while waiting the employee is no longer connected with the movement of the train.

The unions' argument that an employee is "finally released from duty," and therefore no longer on duty within the meaning of Section 21103(b)(1), only when the employee reaches his designated terminal also is without

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other services that are not subject to the HSA, "all such other service must be counted as time on duty." S. Rep. No. 604, 91st Cong., 1st Sess. 9 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1641.

merit. Even if time on duty otherwise continued until an employee reached his or her terminal, Section 21103(b)(4) provides that deadhead transportation from point of duty to place of final release is limbo time, and therefore not time on duty. Because time waiting for deadhead transportation is treated as part of that transportation, this waiting time is treated as limbo time even under the unions' construction of Section 21103(b)(1). In any event, as the Ninth Circuit recognized, the HSA does not define where an employee can be considered finally released from duty. *Skinner*, 975 F.2d at 1425. Once the railroad instructs an employee to cease all duties, the employee has been "finally released from duty" regardless of whether his train has reached a terminal.

C. The Unions Misrepresent The Record Evidence

The unions argue on brief that train crews are commonly given duties, within the meaning of the HSA, while they are waiting on a stopped train for their deadhead transportation to arrive, and, for this reason, waiting time must be counted as time on duty. *See* Pet. Br. at 5-6, 11, 28-29. Again without any record support, they also claim that the Railroads' operating rules require relieved train crews to perform additional duties. Pet. Br. at 28-29. These arguments are utterly baseless. In fact, the uncontested record evidence before the FRA and Seventh Circuit was that, once train crews are relieved from duty after reaching the maximum hours of service they have no further duties, period.[15/] Moreover, the

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15/ *See, e.g.*, J.A. 106 (¶ 8) ("Crews awaiting deadhead transportation are not working–they perform no railroad service."), 114 (¶ 7) ("Once an employee is relieved from duty, whether or not he has reached his maximum hours of duty under the HOSA, . . .

Railroads' instructions to employees are to comply with the HSA. *See, e.g.*, J.A. 105 (¶¶ 5-6).[16/] Thus, the FRA and Seventh Circuit were not presented with the "numerous fact patterns" hypothesized by counsel for the unions in their appellate briefs. Pet. Br. at 6. On the record of this case, the narrow issue before the FRA, Seventh Circuit, and now this Court, is whether time waiting for deadhead transportation by employees who have been relieved from all duties is time on duty.

Moreover, if circumstances arose where a railroad gave train operating employees additional duties, as alleged by the unions on brief, the waiting time issue would never arise. If an employee were given additional such duties, he or she would not in fact have been "finally released from duty" within the meaning of Section 21103(b)(1) and would still be on duty. Similarly, if given additional duties other than those connected with train operation, the employee would still be on duty, because he or she would be performing commingled service within the meaning of Section 21103(b)(3).

The fact that an employee remains subject to orders or supervision of the railroad after being relieved from duty also does not mean he or she is still on duty, as long as the employee is not ordered to perform service for the railroad within the meaning of the HSA. For example, the mere fact that, under standing railroad orders, an employee is prohibited from using drugs or alcohol while waiting on

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that employee no longer has any duties to perform in connection with the movement of a train or otherwise.").

16/ For this reason, there is also no basis for the unions' unsupported contention that employees, who have reached the maximum limit, are disciplined for failing to guard against vandalism. Pet. Br. at 14.

the train for deadhead transportation to arrive does not mean he is performing duties covered by the HSA.

II. The Seventh Circuit's Interpretation Is Required By The Legislative History And Consistent Application Of The HSA

Contrary to the unions' argument, the Seventh Circuit's statutory interpretation is fully consistent with, and is required by, the legislative history of the HSA and its amendments and the longstanding application of the HSA.

A. The 1969 Legislative History Confirms The Seventh Circuit's Interpretation

As originally enacted, the HSA did not expressly define its terms. Their meaning was supplied by interpretive statements of the ICC, which administered the Act until 1967, and court decisions. Although the ICC issued interpretative guidance on a number of issues under the HSA, none specified that time waiting for deadhead transportation was time on duty. J.A. 55-62. In fact, as shown by the affidavits of railroad officials, prior to the 1969 Amendments, this time period was consistently treated as off-duty time. The Railroads considered themselves in compliance with the HSA as long as they relieved a train crew before reaching the maximum limit, even if that crew had to wait thereafter for deadhead transportation to arrive.

Although crews only infrequently were required to wait for deadhead transportation after the maximum hours were reached, because of the sheer number of train assignments on the nation's railroads from 1907 to the 1969 Amendments, there were likely many thousands of instances where relieved crews were left waiting on a train

or elsewhere for deadhead transportation. Yet, in the entire 62-year history of the HSA before 1969, there is only one reported action, brought in the twilight of the ICC's administration of the Act, which claimed that this waiting time was time on-duty. *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967).[17/] This district court decision was an aberration and not followed by the FRA or anyone else.[18/]

The congressional testimony by representatives of both labor and management on the 1969 proposals for amendments to the HSA confirmed the longstanding understanding that the HSA was not violated if a train crew, which had been relieved from all duties after reaching the maximum hours of service, was required to wait thereafter for deadhead transportation. The top official of the BLE testified that rail labor did not consider such waiting time as time on duty under the HSA in the following exchange with Representative Tiernan:

> Mr. Tiernan. . . . . Suppose the train is down the road, down the track 20 miles from the terminus and they get some difficulties in switching, or they get put aside, and it goes 15 or 15½ hours they are out on the job.
>
> The dispatcher has to send a station wagon or other equipment or tell them to take a taxi back into town; is that correct?

17/ The unions, Pet. Br. at 22, and Ninth Circuit, *Skinner*, 975 F.2d at 1427, erroneously state that this action was brought by the FRA.

18/ As we explain, *infra*, the District Court, like *Skinner*, misread early case law under the HSA.

Mr. Coughlin. They often do that; yes sir.

Mr. Tiernan. In other words, they have to get them off that equipment within the 16 hours?

Mr. Coughlin. No. No. In your example this train breaks down 20 miles from the final terminal and the man is there 16 hours. Many is the time that that man is liable to set there for 3 or 4 hours waiting for a car to come out and bring him in.

* * *

Mr. Tiernan. *There is no safety violation there, in the sense that the crew cannot operate after 16 hours?*

Mr. Coughlin. *That is correct.*

* * *

Mr. Coughlin. Let us take this example and if the carrier knows they cannot get you into your terminal within the 16 hours, *there is nothing to prevent the carrier from telling you to go off duty after you have been there 15 hours and 59 minutes. Then you can wait there for 2 or 3 or 4 hours waiting for some type of transportation back into your home terminal and they can call you within 8 hours after they have relieved you out on the road.*

1969 Hearings at 114-15 (testimony of Charles J. Coughlin) (emphasis added).[19/] Thus, one of the principal union witnesses testifying on behalf of union-sponsored legislation agreed that time waiting for deadhead transportation was not historically treated as time on duty.

Congress' understanding of the industry's practices, as explained in this and other testimony, also was made clear in the committee reports on the 1969 Amendments. For example, the House Report stated that "[i]n order to avoid a violation of the 16 hours maximum and the penalties which might accrue therefore, carriers were shown to have released employees a few minutes before the 16 hours expired whether or not such employee had reached his terminal." H.R. Rep. No. 469, 91st Cong., 1st Sess. 7 (1969). *Accord* S. Rep. No. 604, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 1639. Obviously, if time waiting for deadhead transportation counted as on duty time, a HSA violation would not be avoided merely by releasing a crew from duty right at the HSA limit. Thus, Congress clearly understood that the established rule in 1969 was that time waiting for deadhead transportation was considered off duty time.[20/]

19/ A wait of the duration presented in the above-hypothetical is not typical. *See, e.g.,* J.A. 115 (¶ 8).

20/ In contrast to congressional testimony that time waiting for deadhead transportation was not considered time on duty under the HSA, there was no testimony to the contrary or reference to the *Pennsylvania Railroad* decision. This was true, even thought the Chairman of the ICC testified at the 1966 hearings on the HSA and the Administrator of the FRA testified at the 1969 hearings. *See Hearings Before the Surface Transp. Subcomm. of the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 148 (1966) (testimony of Hon. John W. Bush); *1969 Hearings* at 257 (testimony of Hon. Reginald N. Whitman).

The unions attack the Seventh Circuit's interpretation of legislative history, citing the testimony of another union president, UTU President Al Chesser, and the testimony of two carrier officials, R. R. Manion and Albert M. Schonfield. Pet. Br. at 19-21. This testimony does not support the unions; to the contrary, it confirms the Seventh Circuit's view.

The unions argue the testimony of BLE Grand Chief Engineer Coughlin should be disregarded, because UTU President Chesser was testifying for "all of rail labor." Pet. Br. at 20. The unions apparently base this contention on the fact that Mr. Chesser was also Chairman of the Railway Labor Executives' Association. What the unions fail to mention is that only two labor organizations testified on the 1969 HSA amendments, the BLE for engineers and the UTU for other train service employees. As Mr. Chesser himself testified, the BLE at that time was not a member of the RLEA. *1969 Hearings* at 83. Thus, Mr. Coughlin, not Mr. Chesser, was speaking for the engineers union.

Moreover, a review of Mr. Chesser's testimony shows that it nowhere claimed that time waiting for deadhead transportation by an outlawed crew had been considered time on duty. Mr. Chesser's testimony was primarily concerned with the prior practice of treating deadhead transportation and certain interim rest periods as time off duty. *Id.* at 30. Mr. Chesser actually agreed that railroads could lawfully work employees right up to the maximum HSA limit, although it was his opinion that some railroads abused this right. *Id.* at 77.

The testimony cited by the unions as appearing at pages 99-100 of the 1969 Hearings was not even Chesser's, but that of a BLE official. That official agreed with Mr. Coughlin's testimony that a railroad did not violate the HSA if employees worked right up to the maximum limit

(then 16 hours) and then waited for deadhead transportation. For example, he testified:

> Management, *remaining within the law*, could inform the crew to relieve themselves; that is, cease the performance of any duties beyond the 16-hour limitation. Such a crew could find themselves miles from the nearest terminal and possibly have to wait for relief or transportation . . . .

Id. at 96-97 (emphasis added).

Contrary to the unions' mischaracterization, carrier officials did not testify that time waiting for deadhead transportation historically was treated as time on duty. In the excerpts of their testimony referenced by the unions, they were testifying to the practical operational problems that would result if the union-supported bill, H.R. 8449, were adopted. This is illustrated when the missing words from the unions' selective quote of Penn Central official Schonfield are restored:

> In the few cases where it is necessary, because of unusual and unforeseen circumstances, to relieve a crew short of its final terminal, *the present regulations provide the necessary flexibility to do so*, which I do not see possible under the proposed legislation.

Id. at 199 (emphasis added).

Likewise, R. R. Manion, a Vice-President of the Association of American Railroads, was testifying about the practical problems of H.R. 8449 as introduced. The portion of his testimony selectively quoted by the unions came from a section entitled "Deadheading Should Not Be Covered By The Hours-Of-Service Law." He testified

regarding the industry's particular concern that deadhead transportation from a duty assignment, after a crew had been relieved of all duties, not be treated as time on duty, as H.R. 8449 proposed. In fact, Congress agreed with the industry's concern, and the 1969 Amendments treated this deadhead transportation as limbo time, neither on or off duty.

Finally, the excerpt from the 1969 Senate Report which the unions cite deals with interim rest periods occurring during a train crews' tour of duty, not with time waiting for deadhead transportation at the end of a tour of duty. S. Rep. No. 604, 91st Cong., 1st Sess. *reprinted in* 1969 U.S.C.C.A.N. 1636, 1639.

Thus, Congress clearly understood in 1969 that time waiting for deadhead transportation by a relieved crew had historically not been treated as time on duty. When Congress intended in the 1969 Amendments to treat a previously unregulated time period as time on duty, it expressly did so, as in the case of deadhead transportation to a point of duty. Congress did not, however, classify time waiting for deadhead transportation from a duty assignment as time on duty in the 1969 Amendments. Any notion that Congress intended to do so is belied by its treatment of such deadhead transportation as limbo time.

B. The Seventh Circuit's Interpretation Is Consistent With Longstanding Administrative Application Of The HSA

The Seventh Circuit's interpretation was also in accord with the FRA's consistent application of the HSA for 25 years, before it temporarily veered off after *Skinner*. As this Court has observed, consistent long-standing application of a statutory term is an important indication of its meaning. *See, e.g., General Electric Co. v. Gilbert*,

429 U.S. 125, 141-42 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The unions try to kick dust in the Railroads' eyes on this point, claiming that "it is debatable what FRA's interpretation has been." Pet. Br. at 23. In fact, since the 1969 Amendments, the FRA's contemporaneous and consistent application of the HSA has been to count time waiting for deadhead transportation by a relieved crew as limbo time, and therefore not time on duty. The unions were well aware of this longstanding interpretation. For example, the UTU wrote to the FRA in 1977, expressly asking whether the HSA required that crews who had reached the twelve-hour maximum be immediately transported to their terminal. The FRA responded that the time waiting for deadhead transportation by such crews was limbo time. J.A. 62-63 ("[B]ecause no concrete detriment to railroad safety is ordinarily involved, FRA has traditionally viewed most delays associated with deadheading as part of time spent in deadhead transportation."). Even though the UTU official receiving this response testified before Congress in 1978, barely six months later, that the maximum hours of service should be further reduced from twelve to ten hours, the UTU did not raise this waiting time period as a concern. More than ten years later, in 1988, the UTU again wrote to the FRA on the same issue. The FRA responded with the same interpretation as set forth in its 1977 letter. J.A. 65-68 ("There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation to the point of final release as part of the deadheading itself.").

Against this backdrop, the unions only cite the affidavits of "senior [FRA] management personnel" who "considered waiting time as time on duty." Pet. Br. at 23. As their own affidavits show, however, these individuals were really former lower level FRA employees. At least one

was also a former union official. Their affidavits were prepared in 1990, after they had left the FRA, in support of the unions' litigation against the FRA that culminated in the *Skinner* decision.[21/] The affidavits do not reference a single instance where the FRA ever actually assessed a railroad for violating the HSA by keeping a crew waiting for transportation. Indeed, read closely, these individuals are only expressing their own personal interpretation of the HSA, not that of the FRA.

C. Legislative History Subsequent To 1969 Confirms The Seventh Circuit's Decision

The Seventh Circuit's HSA interpretation is also supported by and consistent with subsequent amendments to the HSA. Since 1969, the HSA has been amended on six different occasions. On at least two such occasions, these unions proposed amendments that would directly or indirectly reduce the current twelve maximum hours of service. In 1978, the unions proposed that the maximum be reduced from twelve to eight hours. The Administration, as well as the industry, opposed this reduction, because it "would not allow any margin of error to accommodate the operational difficulties which are common in the [railroad] industry." *Railroad Safety Authorization For Fiscal Year 1979: Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 103 (1978) (testimony of John M. Sullivan, FRA Administrator). While Congress amended the HSA in

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21/ These affidavits were submitted by the unions in the *Skinner* litigation and are not part of the record in this case. Although not provided to this Court by the unions, the FRA submitted a counter-affidavit in that litigation by an actual FRA official.

1978, it declined the unions' proposal. *See Federal Railroad Safety Authorization Act of 1978*, Pub. L. No. 95-574, 92 Stat. 2459.

In 1991, these unions again proposed that the HSA be amended. Particularly relevant to this litigation, the unions urged amendment was necessary because "[e]mployees, at the end of a twelve-hour tour of duty, are being required to remain on trains many hours without being relieved." *Railroad Safety Programs, Hearings before the Subomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 252 (1991) [hereinafter *1991 Hearings*]; *see also id.* at 257, 259-60. The BLE there acknowledged that the "FRA's interpretation of HSA is that an employee who must remain on the engine after twelve hours and is subject to orders, but is not asked to provide any actual service, is considered to be on 'deadhead' time, which is neither 'on' nor 'off' duty." *Id.* at 260. Although clearly aware of the FRA's interpretation of the HSA, Congress declined to reclassify this waiting time.[22/]

The fact that Congress has not revised or repealed the FRA's consistent interpretation, especially after the unions specifically made an issue of that interpretation, is yet another indication that it is the interpretation intended by Congress. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting *N.L.R.B. v. Bell Aerospace Co.*,

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22/ *See also, e.g., Railroad Safety: Hearing Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 13, 45-48 (1987) (rejecting union-sponsored proposals to amend the HSA to limit the number of "tours of duty" an engineer could perform in any 30-day period and require that railroads provide engineers with 8 hour advance call time, because they would reduce unnecessarily the availability of train crews and hamper the flexibility of railroads to respond to operating necessities).

416 U.S. 267, 275 (1974)); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (Congressional acquiescence is presumed from silence in face of an administrative practice or policy.).

III. The Seventh Circuit's Interpretation Is Consistent With Case Law

The unions argue that the Seventh Circuit's and Respondents' interpretation is contrary to case law of this and other courts. They are clearly wrong. The only cases ever to address whether the waiting time at issue here is limbo time under the HSA, as amended in 1969, are the Ninth and Seventh Circuit decisions.

This Court has never before addressed the issue presented by the unions' writ. The unions cite one early HSA decision by this Court, *Missouri, Kansas & Texas Railway v. United States*, 231 U.S. 112, 119 (1913). However, the narrow issue there was whether time spent waiting by a crew, while its locomotive was being serviced and repaired, was on duty time, when the crew would be called to resume operating the locomotive as soon as its servicing was completed. While waiting, the crew was "liable to be called upon at any moment." 231 U.S. at 112. The employees were "not at liberty to go away," because the railroad still required them to operate trains before they would be finally relieved from duty. In that case, the employees' "duty was to stand and wait" for further orders to resume operation of their train. *Id.* at 119. That is not the case here, where employees, having been relieved from all duties at the end of their tour, are not "liable to be called upon at any moment." This Court's decision in *Atchison, Topeka & Santa Fe Railway v. United States*, 244 U.S. 336 (1917), which was also cited by the Ninth Circuit in *Skinner*, did not even involve

the definition of on duty time. The only issue before the court was whether the railroad could justify the admittedly excessive service by coming within an exception in the HSA for delays caused by acts of God or other unforeseen events.

The unions put more weight on the observation that employees were "not at liberty to go away" in *Missouri, Kansas & Texas* than it will bear. For example, an employee in deadhead transportation is "not at liberty to go away," unless he wants to jump out of his deadhead transportation vehicle. Yet courts, including the Ninth Circuit, have held that such transportation was time off-duty, even though "it is true that [the employee] was not free to go where he pleased . . . ." *United States v. Great Northern Ry.*, 285 F. 152, 153 (9th Cir. 1922). The court focused on the fact that the employee had been released from all further train operating duties. *Id.* at 153.

Likewise, none of the other decisions cited by the unions involved the type of waiting time at issue here. In *United States v. Chicago, Milwaukee & Puget Sound Railway*, 195 F. 783 (D. Wash. 1912), the court held that time spent by train crew members preparing a train for departure and inspecting the train upon reaching its destination was to be counted as time on duty. This holding was unremarkable because the crew still had active duties relating to its train. Similarly, in *San Pedro, Los Angeles & Salt Lake Railroad v. United States*, 213 F. 326 (8th Cir. 1914), the railroad was found in violation of the HSA, when it gave additional duties to a fireman who already had reached the maximum hours of service operating a steam locomotive. While the train was stopped, the fireman was told to monitor the locomotive's boiler until the relief crew arrived; if the water level dropped below a certain point, the boiler could explode. The court had no difficulty finding that the fireman was

still on duty. The decisions in *United States v. Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917) and *Northern Pacific Railway v. United States*, 220 F. 108 (9th Cir. 1914), both involved the issue whether the temporary release from duty, for short interim periods ranging from one hour to ninety minutes, after which the crew would be recalled to resume operation of its train, interrupted the calculation of the hours that a crew was continuously on duty. These cases held that such brief interim periods were to be counted as time on duty, because "[t]he run of the crew was not ended; it remained the crew of the train . . . ." 220 F. at 110. Again, that is not the circumstance here, where the crew has been relieved from all duties and is no longer the "crew of the train." Indeed, the unreported decision cited by the unions recognized that an employee is off duty when "he reaches the end of his run, *unless before reaching his destination* he is released from all service in connection with his train." *United States v. Northern Pac. Ry. Co.*, No. 2635 (W.D. Wash. 1914) (emphasis added), cited in Pet. Br. at 26.

In fact, in the 62-year history of the Act before the 1969 Amendments, no case held that time waiting for deadhead transportation by a crew finally released from duty was time on duty until the *Pennsylvania Railroad* decision in 1967. The lack of such cases for so many years, when the government was litigating the proper classification of various other time periods under the HSA, confirms that this waiting time period was not considered time on duty. The District Court in *Pennsylvania Railroad* concluded otherwise, because it misread this Court's decisions to require that all waiting time be counted as time on duty.

Like the District Court, the Ninth Circuit misread the HSA decisions of this Court, as well as its own. The Ninth Circuit concluded that "[t]he FRA's interpretation is

at odds with an unbroken line of decisions by the Supreme Court and by this circuit that waiting time is time on duty under the HSA . . . ." *Skinner*, 975 F.2d at 1426. The Ninth Circuit also concluded that "[w]ithout exception, the lower federal courts followed the Court's lead in holding that waiting time must be included in the calculation of an employee's time on duty . . . ." *Id.* However, as explained, neither of this Court's decisions cited by *Skinner* involved the issue of a relieved crew waiting for deadhead transportation.

The other decisions referenced by *Skinner* are the same ones relied upon here by the unions and likewise did not deal with time spent waiting for deadhead transportation by an expired crew. All were limited to whether meal periods and other "trifling interruptions" broke continuous service.[23/] Such periods were considered on duty time, because the employee had not been finally relieved from duty, could be recalled to duty at any moment, and had no opportunity to rest before being recalled. This was not true for a crew which had been relieved from duty after reaching the maximum limit. Such a crew had no further duties and could not be recalled to duty under the HSA until after the statutorily mandated rest period as previously explained.

The Ninth Circuit's characterization of its own decisions as holding "without exception" that any waiting time, regardless of circumstances, must be classified as on duty time under the HSA also was incorrect. 975 F.2d at 1426. The Ninth Circuit and other courts held that intermittent rest periods of three or four hours duration were off duty

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23/ *See, e.g., Chicago River I. & P. R.R. v. United States*, 253 F. 555 (8th Cir. 1918) (meal periods); *United States v. Chicago, M. & P. S. Ry.*, 197 F. 624 (E.D. Wash. 1912) (meal periods and indefinite delays with no rest).

time. *See, e.g., Southern Pac. Co. v. United States*, 222 F. 46 (9th Cir. 1915).

The Seventh Circuit's decision was fully consistent with this prior case law under the HSA. As the review of these cases shows, employees were considered to be on duty only if they had actual duties to perform in connection with the movement of a train or if they had been temporarily released from duty, but were subject to recall at any moment. Where a crew had been finally relieved from all duties, as is the case with a crew waiting for deadhead transportation, it was considered no longer on duty. In contrast, the Ninth Circuit's *Skinner* decision misread prior case law and was contrary to its own decisions. The Ninth Circuit's erroneous reading of case law was also its sole reason for not giving any deference to the FRA's longstanding treatment of this waiting time as limbo time. *Skinner*, 975 F.2d at 1426. Thus, the Ninth Circuit's opinion was also contrary to this Court's decisions that some deference is due to an agency's interpretation of a statute it administers, even though the agency lacks substantive rulemaking authority on the issue. *See, e.g., Reno v. Koray*, 115 S. Ct. 2021, 2027 (1995); *Martin v. O.S.H.R.C.*, 499 U.S. 144, 157 (1991).

IV. The Seventh Circuit's Interpretation Does Not Present A "Serious Safety Issue"

The unions also argue that this Court should favor the Ninth Circuit's interpretation of the HSA, because "there exists a serious safety issue which is directly impacted by the decision of the Seventh Circuit." Pet. Br. at 29. As identified by the unions, that safety issue is "irregularity of work shifts" and long work hours. *See* Pet. Br. at 29 ("long and irregular work hours"), 31 ("irregularity of work shifts"). The unions' safety issue lacks any support

in the record of this case or otherwise and must be addressed, if anywhere, to Congress.[24/]

With regard to the unions' complaint that train crews are required to work long hours, Congress has already made the legislative judgment, after repeated hearings, that a twelve-hour maximum work shift, followed by at least eight hours rest, is not excessive. The Seventh Circuit's decision does not alter this statutory scheme. If the unions believe there is a safety issue, "the appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act." *Peña*, 44 F.3d at 444.

The unions cite several general studies, newspaper articles, and anecdotes for the proposition that irregular work cycles contribute to stress and fatigue. Pet. Br. at 30-36. But, the HSA does not even regulate the regularity or time of day or night that a train crew can be called to work. Again, if the unions believe irregular work hours or disrupted bio-rhythms create a serious safety issue, then their recourse is to Congress. They should not make policy arguments to this Court seeking judicial amendment of the HSA through a re-interpretation of well-settled legislative terms.

In fact, the unions presented the identical safety arguments to Congress in 1991, where they sought the same result they are seeking here in this Court--reversal of the FRA's interpretation of time waiting for deadhead transportation as limbo time. The unions' brief on the merits to this Court bears a remarkable resemblance to, and in some places draws verbatim from, the BLE's prepared statement submitted to Congress in 1991. *Compare, e.g., 1991 Hearings* at 257-269 *with* Pet. Br. at

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24/ The unions can also seek changes in the hours of service of their members through collective bargaining. 49 U.S.C. § 21107.

19-24, 30-37. The same discussion of articles or testimony on sleep disorders or irregular work cycles by Dr. Charles Czeisler, Director of Circadian and Sleep Disorders, Michael K. Caplen, locomotive engineer, Dr. Donald I. Tepas, NTSB Chairman James L. Kolstad, and others is found in the unions' presentation to this Court as to Congress.[25/]

Not only are the unions pitching this safety argument in the wrong forum, they lack any support for their position. The HSA interpretation adopted by the Seventh Circuit is the one that the FRA continuously has applied since 1969. If the treatment of this waiting time as limbo time created a serious safety issue, surely someone would have noticed by now. In fact, the government conceded at the Seventh Circuit *en banc* argument that it had no evidence that treating this time period as limbo time had ever resulted in a train accident, prompting that Court to conclude that the FRA's changed interpretation (now embraced only by the unions) did not contribute to railroad safety. *Peña*, 44 F.3d at 444. Prior to this, the FRA had consistently opined that treating this waiting time as limbo time did not raise any "concrete detriment to railroad safety." J.A.

25/ While these articles on irregular work schedules were presented to Congress and this Court, they were not part of the administrative record in this case. As explained, the unions elected not to participate in the proceedings before the FRA which are the basis for these judicial proceedings. They waited to intervene until the case was before the Seventh Circuit and referenced these various materials for the first time in their appellate brief. This is an additional reason that the unions' supposed safety issue is not properly before this Court. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some record made initially in the reviewing court.").

63.[26/] None of the reports or newspaper articles on irregular work shifts concludes otherwise.

For these reasons, the serious safety issue contended by the unions is not a proper issue for this Court and provides no basis for overturning the Seventh Circuit.

CONCLUSION

The unions' arguments lack any merit and should be rejected. The Seventh Circuit's en banc decision should be affirmed.

Respectfully submitted,

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26/ This was also the FRA's position in *Skinner*. *See* Br. for Appellant at 18, *Brotherhood of Locomotive Eng'rs, et al. v. Skinner*, Nos. 91-35911 and 91-36061 (filed Nov. 12, 1991) ("the safety purposes of the Act are not implicated by the fact that [employees] remain under the railroad's supervision.").

(10)

No. 94-1592

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OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

CORRECTED COPY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether time spent by members of a train crew waiting for transportation to their point of final release is counted as "time on duty" under the Hours of Service Act, 49 U.S.C. 21101 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., PETITIONERS

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a) is reported at 44 F.3d 437. The opinion of the court of appeals panel (Pet. App. 21a-28a) is reported at 29 F.3d 324.

JURISDICTION

The final judgment of the court of appeals, following its en banc rehearing, was entered on December 29, 1994. J.A. 19, 36, 52. The petition for a writ of certiorari was filed on March 28, 1995, and was granted on

June 19, 1995 (115 S. Ct. 2575). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Hours of Service Act (HSA)[1] is designed to foster railroad safety, by limiting the number of hours that any member of a train crew may remain on duty and by specifying periods of off-duty time that crew members must be given before they may return to work. Thus, as a general matter,

> a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—

[1] At the time this suit was commenced, the Hours of Service Act was codified at 45 U.S.C. 61 *et seq.* (1988 & Supp. V 1993). During the pendency of the present action, Congress repealed those provisions of the United States Code as part of a broad recodification of federal transportation laws. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. The repeals effected by the recodification do not apply, however, to "proceedings that were begun before the date of enactment of this Act." Pub. L. No. 103-272, § 7(b), 108 Stat. 1379. Congress also made clear that the recodification is intended to make no substantive changes in the affected laws, although it alters their arrangement and language in certain respects. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). Pursuant to Pub. L. No. 103-272, the provisions of the HSA are now codified chiefly in Chapter 211 of Title 49 of the United States Code. See 49 U.S.C. 21101-21108. Other HSA provisions are codified at 49 U.S.C. 20102, 21303, and 21304. The provision of pivotal importance to the present action—45 U.S.C. 61(b)(3) (1988), which defined "time on duty"—is now codified at 49 U.S.C. 21103(b). Sections 21101-21107 and 21303 are reproduced as an appendix to this brief. We will refer herein (as petitioners have) to the pertinent provisions as recodified.

> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

49 U.S.C. 21103(a) (App., *infra*, 2a).[2] The present case concerns the appropriate treatment of time spent waiting for "deadhead transportation"[3] at the conclusion of an employee's period of service.[4] Such

[2] The statutory limitations on hours of service do not apply to a situation involving "a casualty," "an unavoidable accident," "an act of God," or "a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal." 49 U.S.C. 21102(a)(1)-(4) (see App., *infra*, 1a-2a). The HSA also provides that "[a] train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency." 49 U.S.C. 21103(c) (App., *infra*, 4a).

[3] "Deadhead transportation" is transportation to or from a duty assignment, not including normal commuting time.

[4] 49 U.S.C. 21103 (App., *infra*, 2a-4a) applies to "train employee[s]," defined by the HSA as individuals "engaged in or connected with the movement of a train, including a hostler." 49 U.S.C. 21101(5) (App., *infra*, 1a). The HSA establishes similar requirements concerning the on- and off-duty hours of "signal employees," see 49 U.S.C. 21104 (App., *infra*, 4a-6a), and "dispatching service employees," see 49 U.S.C. 21105 (App., *infra*, 6a-7a). The statutory provision governing "deadhead transportation" (49 U.S.C. 21103(b)(4) (App., *infra*, 3a)), however, applies only to "train employees" and has no analogue in Sections 21104 and 21105, since only employees engaged in or

waiting time may occur when a train crew "expires" —*i.e.*, reaches the end of the time period during which it may remain on duty—before the train and crew reach their scheduled destination. In such instances, the Act requires that the crew cease operating the train, so the train must be stopped if there is no replacement crew present. The expired crew may then be required to wait, either on the train or elsewhere, for the arrival of a relief crew and for a means of transportation to the place of the expired crew's final release. See Pet. App. 3a.

As originally enacted in 1907, and continuing until its amendment in 1969, the HSA implicitly divided all employee time into two categories—"on duty" and "off duty"—but provided no express statutory definition of either term. See 45 U.S.C. 61 *et seq.* (1964). Early judicial decisions held as a general matter that interim periods of inactivity at the work site during which employees awaited further instructions were properly regarded as "on duty" time, but that time spent in deadhead transportation, both to and from the work site, was "off duty" time. See, *e.g.*, *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112, 119 (1913); *United States* v. *Great Northern Ry.*, 285 F. 152 (9th Cir. 1922). There appears, however, to have been no clearly established answer to the question now at issue, regarding the proper characterization of time spent waiting for deadhead transportation from a duty assignment. Although the railroads have offered anecdotal evidence that such time was treated as "off duty" time during that period (C.A. App. 68-69), the only reported judicial decision addressing the question concluded that the particular waiting time at issue in that case should be considered time on duty. See *United States* v. *Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967).

connected with the movement of a train can be expected to utilize deadhead transportation.

Congress substantially amended the HSA in 1969, reducing the number of permissible hours on duty and providing, for the first time, a definition of "on duty" time. See 45 U.S.C. 61(b)(3) (1988). Congress dealt specifically with the issue of deadhead transportation time, adopting a compromise position between those advocated by union and industry groups. By virtue of that amendment, the Act in its current form provides that "[t]ime spent in deadhead transportation *to* a duty assignment is time on duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a) (emphasis added). The Act further provides that "time spent in deadhead transportation *from* a duty assignment to the place of final release is neither time on duty nor time off duty." *Ibid.* (emphasis added). That provision effectively creates a third category of time, commonly known as "limbo time." Limbo time does not count as on-duty time subject to the specified statutory maximum of on-duty hours during any one period of service, but it also does not count toward the statutory minimum of off-duty rest time that a crew member must be given prior to the beginning of the next period of service. See Pet. App. 3a-4a.[5]

[5] The House Report on the 1969 amendments explains:

> Time on duty was originally proposed, among other things, to include time spent in deadhead transportation to and from a duty assignment. The bill as reported provides that only time spent in deadhead transportation to a duty assignment should be considered as time on duty. However, the reported bill provides that time spent in dead-

The Federal Railroad Administration (FRA) in the Department of Transportation is responsible for enforcing the HSA.[6] Subsequent to the 1969 amendments, and continuing until 1992, the FRA took the position that, when a crew member is relieved of all responsibilities but is required to await the arrival of deadhead transportation to his or her point of final release, the time spent waiting should be considered limbo time. See Pet. App. 34a-41a (letter from FRA Assistant Chief Counsel Gregory B. McBride to counsel for the present petitioners (Aug. 4, 1989)). The FRA took the position that such waiting time "most closely resembles, and is part and parcel of, deadheading from duty." *Id.* at 35a. As the agency explained, such time cannot be considered off-duty time, because it does not afford a true opportunity for rest; yet there is little or no safety rationale for considering such time to be part of time on duty, as long as the crew member has no duties to perform. *Id.* at 37a. The FRA made clear, however, that the time spent waiting would be considered time on duty if the

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head transportation from a duty assignment to his point of final release shall not be counted in the 10 or 8 (as the case may be) consecutive hours off duty.

H.R. Rep. No. 469, 91st Cong., 1st Sess. 7-8 (1969) (*1969 House Report*).

[6] The Secretary of Transportation may impose a civil penalty of "at least $500 but not more than $10,000" for each violation of the Act. 49 U.S.C. 21303(a)(2) (App., *infra*, 9a). A penalty of up to $20,000 may be imposed for a grossly negligent violation, a pattern of repeated violations causing an imminent hazard of death or injury, or a violation that actually results in death or injury. *Ibid.* Civil penalties may be collected through actions brought by the Attorney General in federal district court. 49 U.S.C. 21303(b) (App., *infra*, 9a).

crew member was required to perform any service for the railroad. *Id.* at 37a-40a.

2. In 1990, petitioners Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) filed lawsuits in Oregon and California challenging the FRA's interpretation of the HSA on this issue. On appeal, the United States Court of Appeals for the Ninth Circuit consolidated the two cases for decision, which it rendered in September 1992. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (*UTU*). The Ninth Circuit held that the waiting time at issue must be counted as "time on duty" under the HSA, believing it was "clear" that that result obtained prior to the 1969 HSA amendments and that those amendments evinced no congressional intent to alter the law on this point. See *id.* at 1426-1427. The court of appeals also expressed the view that crew members awaiting deadhead transportation may face "contingent responsibilities," in that they "may be required to provide certain additional services for the railroad, should the need for any of those services arise." *Id.* at 1423, 1428.

The government did not seek review in this Court of the *UTU* decision, which was the first appellate ruling on the issue. The FRA undertook to re-evaluate its approach to the question, however, and the agency determined that it would apply the Ninth Circuit's interpretation of the HSA on a nationwide basis. That shift in policy was announced in an October 28, 1992, letter from FRA Chief Counsel S. Mark Lindsey to Robert W. Blanchette, Vice Pres-

ident of the Association of American Railroads (J.A. 73-77), and was later explained in a notice published in the *Federal Register*. 58 Fed. Reg. 18,163 (1993) (J.A. 158-167).

In the *Federal Register* notice, the FRA stated that it did not agree with the legal rationale of the Ninth Circuit. See J.A. 160. The FRA recognized, however, that the text of the HSA does not provide an unambiguous characterization of time spent awaiting deadhead transportation, and stated that "the issue has always been a close one." *Ibid.* The FRA noted that application of the stricter interpretation adopted by the Ninth Circuit could contribute to rail safety, insofar as it could reduce the number of lengthy waits for deadhead transportation, which in turn can contribute to the problem of cumulative fatigue from irregular work schedules. J.A. 161-162. The FRA also observed that its experience in Oregon (where an injunction mandating the stricter approach had been in effect for more than a year) had allayed any concerns that this approach might induce railroads to keep "expired" crews working beyond the statutory limit, thereby disserving the safety purposes of the Act. J.A. 160-161. As the FRA has subsequently made clear, however, its primary rationale for adopting the Ninth Circuit's interpretation was simply to ensure "uniform application of the Act" to railroads operating in various parts of the nation. J.A. 162; see Pet. App. 30a.

3. In 1993, nine major railroads initiated the present action, seeking direct review in the United States Court of Appeals for the Seventh Circuit of the FRA's new policy, as announced in the *Federal Register* notice and in two other communications.[7] Initially, a divided panel of that court upheld the FRA's action. Pet. App. 21a-28a. The panel majority decided that the agency's position was "reasonable and based upon a permissible construction of the HSA" and stated that it "would be hard pressed to say that an agency's reliance upon the opinion of a Circuit Court of Appeals is unreasonable." *Id.* at 26a. One judge dissented, concluding that the agency's revised interpretation of the HSA was not reasonable. *Id.* at 27a-28a.

The respondent railroads sought rehearing en banc, which the court of appeals granted. Following reargument, the en banc court unanimously ruled in the railroads' favor. Pet. App. 1a-20a. A majority of the en banc court concluded, as a preliminary matter, that the FRA's interpretation was not entitled to substantial deference, in light of the history of the agency's treatment of the issue, including the purported inconsistency of the FRA's legal positions. *Id.* at 7a-10a. The majority went on to hold that, in any event, "the statute itself resolves this issue quite clearly." *Id.* at 10a. Under the HSA, the majority observed, time spent in deadhead transportation from the train to the point of final release is not treated as time on duty (because fatigue at that point poses no

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[7] The respondent railroads filed separate petitions for review of the *Federal Register* notice, an earlier FRA memorandum stating the agency's position on the issue, and the FRA's subsequent letter denying the railroads' Petition for Interpretation of the Hours of Service Act, which the FRA treated as a petition for rulemaking. See J.A. 92-96, 168-173, 181-186. The Seventh Circuit consolidated the three petitions and ruled, in its en banc opinion, that the FRA's interpretation constitutes "final agency action[]" reviewable under 28 U.S.C. 2342(7) (Supp. V 1993). Pet. App. 5a-6a.

immediate danger) but is also not treated as time off duty (because it does not afford any genuine opportunity for rest). *Id.* at 12a. The majority concluded that time spent awaiting the arrival of a deadhead vehicle after completion of operating responsibilities should similarly be counted as "limbo time" because the very same considerations apply to it. *Ibid.*

Three concurring judges took issue with the majority's comments about the FRA's purported inconsistency, noting that the agency had in fact adhered consistently to two distinct principles: (1) that the better interpretation of the HSA is to treat the sort of waiting time at issue here as limbo time; and (2) that there is a substantial need for national uniformity in applying the HSA, "given the integrated nature of the national railroad system." Pet. App. 17a. The concurring judges concluded, however, that the FRA's policy decision in 1992 to favor the value of uniformity (and accordingly to acquiesce in the Ninth Circuit's ruling in *UTU*) was not the sort of agency decision to which a court owes deference. *Id.* at 19a-20a.

4. In light of the en banc decision in the present case, the FRA has again reevaluated its position. In a March 1, 1995, letter to Robert W. Blanchette of the Association of American Railroads, FRA Chief Counsel S. Mark Lindsey stated that, in all parts of the nation outside the Ninth Circuit, the agency would revert to its prior view that time during which an employee is "merely required to remain on a train" awaiting deadhead transportation "most closely resembles, and is part and parcel of, deadheading from duty," and would therefore be treated as limbo time. Pet. App. 31a. The Chief Counsel's letter observed that the FRA had "adopted the Ninth Circuit's

interpretation primarily to achieve national uniformity," but that the Seventh Circuit's ruling "has now made this goal impossible to achieve unless and until the United States Supreme Court resolves the split between the circuit courts." *Id.* at 30a. At the same time, the FRA emphasized—consistent with its earlier pronouncements—that, "if an employee is required to perform service of any kind during that period * * *, he or she will be considered as on duty until all such service is completed." *Id.* at 31a. The FRA also indicated that it would continue, pending the possible resolution of the issue by this Court, to adhere to the *UTU* ruling within the States constituting the Ninth Circuit. *Id.* at 32a.[8]

SUMMARY OF ARGUMENT

A. Time spent waiting for the deadhead vehicle at the conclusion of a duty assignment is properly characterized as "part and parcel" of deadhead transportation, and thus as "limbo time." The term "transportation" may naturally be understood to encompass

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[8] A number of railroads—*i.e.*, those that were petitioners below in the present case, and that operate within the Ninth Circuit—have instituted a new action seeking review of the FRA's March 1, 1995, announcement insofar as it reflects the agency's decision to continue applying the Ninth Circuit's rule within that Circuit. *Atchison, T. & S.F. Ry.* v. *Peña*, No. 95-1238 (D.C. Cir., filed Apr. 28, 1995). Relying on *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 169-172 (1984), the railroads contend that, under the doctrine of mutual collateral estoppel, the FRA is required to abide by the Seventh Circuit's decision even within the Ninth Circuit, with respect to railroads that were parties to the present litigation. All proceedings in that action are being held in abeyance, however, pending this Court's disposition of the instant case. See Order, No. 95-1238 (D.C. Cir. July 17, 1995).

incidental activities that do not themselves involve movement but that are prerequisites to its occurrence, such as awaiting the arrival of a vehicle. That reading is strongly supported by the policies underlying the Hours of Service Act. Time spent in deadhead transportation from a duty assignment is not time on duty because the worker's fatigue during that period poses no danger to himself or others. It is not time off duty because the employee is unlikely to have a meaningful opportunity for rest. Because those considerations apply with equal force to time spent waiting for the deadhead vehicle, that waiting period should similarly be treated as limbo time. That reading is supported by the pertinent Senate Report, which makes clear that time spent in deadhead transportation *to* a duty assignment includes time spent waiting for the deadhead vehicle.

B. Petitioners make little effort to explain why the waiting time at issue here does not fall within "time spent in deadhead transportation." They argue instead that such waiting periods are covered by other provisions of the HSA, which define the scope of "time on duty." Those arguments are without merit. The statutory provisions on which petitioners rely are inapplicable by their terms to the waiting periods at issue. But even if this waiting time appeared to fall simultaneously within two statutory provisions—one defining it as time on duty, and the other defining it as neither time on duty nor time off duty—consideration of the structure and purposes of the HSA would be appropriate to resolve the anomaly. Because no threat to railroad safety is created when employees are required to wait for the deadhead vehicle after a 12-hour period of service, treatment of

the waiting period as neither on- nor off-duty time best effectuates the policies of the Act.

C. Petitioners place substantial reliance on the legislative history of the 1969 amendments to the HSA. In our view, the legislative history offers no support to petitioners' position. The hearing testimony upon which petitioners rely did not address the question presented in this case, either directly or by logical implication. Prior to 1969 there was no clearly established rule treating the waiting periods at issue here as time on duty; and, in any event, Congress manifestly sought to change the legal status of time spent in deadhead transportation at the conclusion of a duty assignment.

D. Finally, the FRA's construction of the pertinent statutory provisions is entitled to deference if this Court finds those provisions ambiguous. The agency has consistently recognized that the time at issue is most persuasively characterized as part of deadhead transportation, and thus as limbo time. Its decision to acquiesce in the Ninth Circuit's *UTU* ruling on a nationwide basis was expressly grounded in its desire for uniform application of the Act. After the Seventh Circuit's en banc decision, however, it was apparent that no such uniformity could be achieved absent intervention by Congress or this Court. The agency therefore reverted (in States outside the Ninth Circuit) to the position that it had consistently espoused prior to the *UTU* decision. The FRA's efforts to adapt its policies to a changing legal landscape hardly constitute the sort of unexplained inconsistency that might render judicial deference unwarranted.

ARGUMENT

TIME SPENT BY A TRAIN EMPLOYEE WAITING FOR A VEHICLE TO TAKE THE EMPLOYEE FROM HIS OR HER FINAL DUTY ASSIGNMENT TO THE PLACE OF FINAL RELEASE IS NOT TIME ON DUTY UNDER THE HOURS OF SERVICE ACT

A. The Text, Purpose, And History Of The HSA Support The Conclusion That Time Spent Waiting For The Deadhead Vehicle Is "Part And Parcel" Of "Time Spent In Deadhead Transportation," And Thus Is "Limbo Time"

Prior to the 1969 amendments to the Hours of Service Act, all deadheading time, both to and from duty, was generally considered to be off-duty time. See, *e.g.*, *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112, 119 (1913); S. Rep. No. 604, 91st Cong., 1st Sess. 7 (1969) (*1969 Senate Report*) (noting that, under the pre-1969 Act, an employee's off-duty time "might not be time for rest but could include appreciable time the employee spent in deadheading back from the place where he was released from time on duty"). Congress altered that rule in 1969, adopting a carefully tailored provision under which time spent in deadhead transportation *to* a duty assignment is counted as time on duty, but time spent in deadhead transportation *from* a duty assignment to the place of final release is counted as neither on-duty nor off-duty time—*i.e.*, as "limbo time." See 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). If, as the FRA has concluded, time spent waiting for a deadhead vehicle is indeed "part and parcel" of deadhead transportation

(Pet. App. 31a),[9] then the proper categorization of such waiting time is clear: it is limbo time, pursuant to the express language of Section 21103(b)(4).[10] The agency's position is consistent with the text of the HSA and with its purpose and history.[11]

1. Although the term "transportation" connotes motion, it may naturally be understood to encompass incidental activities that do not themselves involve movement but that are prerequisites to its occurrence, such as awaiting the arrival of a vehicle. For example, if airline regulations required passengers to

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[9] That was the FRA's long-standing position prior to the Ninth Circuit's 1992 ruling in *UTU*, see Pet. App. 37a, and it is the FRA's position now.

[10] If, on the other hand, such waiting time is *not* part of deadhead transportation, its proper categorization would be somewhat more problematic. In the court below, the FRA took the position that, assuming such time not to be part of deadheading, it was best categorized as a form of "commingled service" to the railroads, and thus as time on duty under 49 U.S.C. 21103(b)(3) (App., *infra*, 3a). See U.S. C.A. Br. 20-21. The intervening unions invoked both the commingled service provision and those regarding interim rest periods as bases for categorizing that type of waiting period as time on duty. Union C.A. Br. 7, 9. The railroads, as an alternative to their principal argument that such waiting time is part of deadheading, suggested that it might be considered time off duty—a result which, even if it could be textually supported, would lead to the bizarre result that a crew could be placed back in service if its wait for deadhead transportation amounted to ten hours or more.

[11] The Hours of Service Act contains no provisions regulating the pay or other financial benefits that must be provided to railroad employees. Thus, resolution of the question whether the waiting periods at issue here are limbo time rather than on-duty time will not determine any question concerning compensation for those periods.

arrive at the gate 30 minutes prior to takeoff, that half hour could readily be characterized as part of a passenger's "travel time." Similarly, an attorney who telephones her office during a layover in Cincinnati might quite naturally state that she is "in transit" or "en route" from Washington to Los Angeles. By the same token, the sort of waiting time at issue here may reasonably be regarded as part of deadhead transportation. If, for example, crew members are instructed at midnight to stop the train and wait for the arrival of a van to take them to their lodging, and if the van picks them up at 1:30 a.m. and drops them at their designated terminal at 4:00 a.m., it would be altogether natural for a crew member to say that he had spent four hours "in deadhead transportation to [his] place of final release."

2. In determining whether waiting time is included within "time spent in deadhead transportation," the Court should not view that phrase in isolation but should consider it in context, looking "to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2182 (1993) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)); see *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In the present case, the logic as well as the literal language of Section 21103(b)(4) supports the FRA's conclusion that time spent waiting for the deadhead vehicle is "part and parcel" of deadhead transportation. Pet. App. 31a.

The overriding purpose of the HSA is "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R.R.* v. *United States*, 247 U.S. 197, 199-200 (1918). To achieve that result, the HSA provides that (1) with rare exceptions (see note 2, *supra*), railroad workers may not remain on duty for more than 12 consecutive hours, and (2) railroad employees must be given an adequate opportunity for rest before beginning the next period of service.[12] As the court of

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[12] The HSA also reflects Congress's determination that even periods of inactivity may increase a worker's level of fatigue unless the length and location of those periods is such that the worker is afforded a genuine opportunity to rest and recuperate. Thus, "interim period[s] available for rest" are generally treated as time on duty unless they extend for four hours or more and occur at a designated terminal. 49 U.S.C. 21103(b)(5) and (6) (App., *infra*, 3a); see pages 20-21, *infra*. The HSA also provides that "[t]ime spent in deadhead transportation to a duty assignment is time on duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a).

The distinct ways in which Congress dealt with deadheading to and from train duty mirror the statutory purpose in a direct, commonsense manner. A worker who spends six hours in deadhead transportation and then works on train operation for 12 hours may be seriously fatigued. That situation directly implicates the policies of the HSA, since the worker may be required to perform safety-sensitive tasks as much as 18 hours after he reported for duty. When deadhead transportation *follows* the period of service, however, the worker may be similarly fatigued by the end of 18 hours, but his fatigue poses no danger because it occurs *after* the period during which he is responsible for train operation. The HSA accordingly prohibits the former scenario (by classifying the initial six hours as time on duty) but permits the latter—while further providing that the mandatory period of off-duty time, which is intended to

appeals recognized, time spent in deadhead transportation from a duty assignment "is not on-duty time because the employee has no more operational responsibilities and this time, therefore, does not implicate railroad safety.[13] * * * [I]t is not off-duty time because the employee receives no legitimate opportunity to rest." Pet. App. 12a. Because those considerations apply with equal force to time spent waiting for the deadhead vehicle, treatment of that time as "part and parcel" of deadhead transportation effectuates the purposes of the HSA.[14]

3. The committee reports on the 1969 HSA amendments—which first added the provision dealing with deadhead time to and from duty assignments—do not

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ensure an adequate opportunity for rest, does not commence until after the deadhead transportation is completed.

[13] See 49 U.S.C. 21103(b)(2) and (3) (App., *infra*, 3a) (providing that time the employee "is engaged in or connected with the movement of a train," as well as time spent "performing any other service for the railroad" during a 24-hour period in which the employee is engaged in or connected with the movement of a train, is "time on duty").

[14] Suppose that a crew stops a train and ceases all operating duties at midnight, waits for a deadhead vehicle until 2:00 a.m., and arrives at its home terminal at 4:00 a.m. In terms of the purposes of the HSA, there is no difference between the first two hours and the second two hours. Regardless of whether the crew is awaiting arrival of the deadhead vehicle or is riding home in that vehicle, two pertinent conditions obtain: first, there is no immediate danger despite the crew members' fatigue, because they have no operating responsibilities; second, the crew members are afforded no genuine opportunity for rest. Accordingly, the purposes of the statutory scheme are fully effectuated by treating time spent waiting for arrival of the deadhead vehicle as part of "time spent in deadhead transportation," and thus as limbo time.

directly address the proper characterization of time spent awaiting a vehicle for deadhead transportation from a duty assignment to the employee's place of final release. The Senate Report does state, however, that time spent in deadhead transportation *to* a duty assignment is to be "calculated from the time [the employee] *reports for duty* until he reaches his duty assignment." *1969 Senate Report* 8 (emphasis added). That statement presumes that, where a gap exists between the time when the employee reports for duty and the time when the deadhead vehicle is ready for departure, such waiting time is part of "time spent in deadhead transportation" to a duty assignment. 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). Although the legislative history contains no similar discussion regarding deadhead transportation *from* a duty assignment, such a discussion is hardly necessary. This Court has consistently recognized that, "[p]resumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'" *United States Nat'l Bank*, 113 S. Ct. at 2185 (quoting *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993)). Where, as here, the same phrase ("time spent in deadhead transportation") is repeated within a single statutory subsection, it would be odd indeed if it had different meanings in the two clauses.

B. Time Spent Waiting For The Deadhead Vehicle After Completion Of A Duty Assignment Does Not Fall Within The HSA's Definition Of "Time On Duty"

Apart from the bald assertion (Pet. Br. 15) that the phrase "time spent in deadhead transportation" in 49 U.S.C. 21103(b)(4) (App., *infra*, 3a) does not encompass

time awaiting arrival of the deadhead vehicle, petitioners make no effort to counter the foregoing analysis. Rather, relying on several other paragraphs of Section 21103(b), they contend that the waiting time at issue here cannot be considered limbo time because it falls within the statutory rules for determining what constitutes "time on duty." Petitioners' argument is without merit.

1. Petitioners assert (Pet. Br. 13-14) that time spent waiting for deadhead transportation constitutes an "interim period available for rest" that is deemed to be time on duty under 49 U.S.C. 21103(b)(5) or (6) (App., *infra*, 3a).[15] The period of time at issue here, however, is not an "interim" rest period, because it occurs after a crew member's operating duties have been completed rather than between periods of service to the railroad. Sections 21103(b)(5) and (6) reflect Congress's recognition that, when periods of inactivity are (by reason of their length or their location) insufficient to break a worker's continuity of service, the worker may (when he resumes his duties after the "interim" period) be no less fatigued than if he had received no respite at all.[16] That

[15] Those subsections provide that any interim period available for rest at a place other than a designated terminal is time on duty (49 U.S.C. 21103(b)(5) (App., *infra*, 3a)), and that even such a period at a designated terminal is time on duty unless it is at least four hours long (49 U.S.C. 21103(b)(6) (App., *infra*, 3a)).

[16] The Senate Report notes that "[i]nherent in the calculation of whether an employee is on duty is that of whether the interim periods provided for his rest are such and at such places as to provide the employee with the proper opportunities and facilities for rest and relaxation from the duties of his occupation." *1969 Senate Report* 7. The Report also observes that prior judicial decisions had "not established a minimum period of release which would constitute a bona fide break in continuity of service." *Ibid.* The question whether a particular rest period constitutes a sufficient "break in continuity of service" is relevant only if the rest period is both preceded and followed by periods of service to the railroad.

insight simply has no relevance to the waiting time at issue here, because the worker's fatigue following the completion of his duties presents no danger to himself or others. Cf. note 12, *supra*.[17]

2. Petitioners' reliance (Pet. Br. 15) on 49 U.S.C. 21103(b)(3) (App., *infra*, 3a) is also without merit. Section 21103(b)(3) provides that "[t]ime spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train

[17] Even if the waiting time at issue here were thought to fall within the terms of Section 21103(b)(5) or (6), it would not follow that it must be regarded as time on duty. As explained above, the waiting time here is properly regarded as "time spent in deadhead transportation from a duty assignment to the place of final release," a category that the HSA identifies as "neither time on duty nor time off duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). If the waiting period appeared to be covered by two distinct statutory provisions stating that the time in question was to be characterized in different ways, consideration of the structure and purposes of the HSA as a whole would be appropriate to resolve the anomaly. As explained above, no threat to railroad safety is created when employees are required to wait for a deadhead vehicle after a 12-hour period of service, so long as the workers are later afforded an adequate period of off-duty time to rest before they resume their duties. Thus, even assuming that this waiting time could plausibly be characterized as both "time spent in deadhead transportation" and an "interim period available for rest," treatment of the waiting period as neither on- nor off-duty time best effectuates the policies of the Act.

is time on duty." That provision, addressing what is generally referred to as "commingled service," ensures that railroads do not evade the policies of the HSA by (for example) requiring a worker already somewhat fatigued by several hours of office work to continue with a lengthy operating shift.[18] As the FRA has repeatedly emphasized, however, the agency regards the waiting time at issue here as limbo time only if the employee is *not* required to perform any duties for the railroad. See pages 25-26, *infra*. Such waiting periods fall outside the coverage of Section 21103(b)(3), which applies only when an employee is required to "perform[] * * * service for the railroad."

3. Finally, petitioners rely (Pet. Br. 15) on 49 U.S.C. 21103(b)(1) (App., *infra*, 3a), which provides that "[t]ime on duty * * * ends when the employee is finally released from duty." That position is flawed in two respects. First, petitioners' argument presumes that a worker is not "finally released from duty" until the conclusion of deadhead transportation from his "duty assignment" to his "place of final release." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a).[19] The more logical

[18] Although the other paragraphs of 49 U.S.C. 21103(b) (App., *infra*, 2a-4a) were taken more or less directly from 45 U.S.C. 61(b) (1988), the current commingled service provision (paragraph (3)) collapses two provisions of the earlier codification. Former 45 U.S.C. 61(b)(3)(E) (1988) included within the definition of time on duty "[s]uch period of time as is otherwise provided by this chapter." That portion of the definitional section thus incorporated the separate commingled service provision of 45 U.S.C. 62(b) (1988).

[19] See Pet. Br. 15 (relying on Section 21103(b)(1) for the proposition that "time on duty continues until the employee reaches his or her designated terminal").

reading, however, is that the point at which an employee is "finally released from duty" (and his "time on duty" ends) is the point at which he is finally relieved of the responsibility to perform services for the railroad.[20] That point precedes rather than follows the deadhead transportation (including any incidental waiting time) at issue here.[21]

[20] Thus, the 1969 Senate Report states that "time on duty * * * terminates when [the employee] is finally released of all responsibilities." *1969 Senate Report* 8. The FRA's long-standing interpretation is stated in the same way. 49 C.F.R. Pt. 228, App. A. Prior to its recodification in 1994 (see note 1, *supra*), moreover, the HSA provided that "time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty." 45 U.S.C. 61(b)(3)(C) (1988). That language implied that, absent the proviso, time spent in deadhead transportation from a duty assignment would have been off-duty time.

[21] This interpretation of the Act is supported by the description in the 1969 Senate Report of the situation the deadhead transportation provisions are intended to address. The Senate Report states:

> Many examples were presented in the hearings of employees working up to the 16-hour limitation and then being required or permitted to report for duty after periods of 10 or 8 hours "off duty." The off-duty time, however, well might not be time for rest but could include appreciable time the employee spent in *deadheading back from the place where he was released from time on duty.* The law should be amended so that deadhead time will not be counted as time off duty.

1969 Senate Report 7 (emphasis added). This passage plainly contemplates that "time on duty" ends (and that a person is "released" from duty) prior to the deadhead transportation back from that place. Accord H.R. Rep. No. 469, 91st Cong., 1st Sess. 7 (1969) (*1969 House Report*). Although the Senate Report states that the law should be amended to provide that

Petitioners' argument would be unavailing, moreover, even if their interpretation of Section 21103(b)(1) were the correct one. In arguing that this provision generally covers all time until an employee reaches his or her designated terminal, petitioners themselves recognize that this is so only "unless the Act provides otherwise." Pet. Br. 15.[22] Petitioners also recognize (*id.* at 14) that "time spent in deadhead transportation from a duty assignment" (49 U.S.C. 21103(b)(4) (App., *infra*, 3a)) is limbo time even though (on petitioners' reading of Section 21103(b)(1)) it precedes the time at which an employee is "finally released from duty." Petitioners' reliance on Section 21103(b)(1) therefore begs the question whether time spent waiting for the arrival of the deadhead vehicle is or is not part of "time spent in deadhead transportation." If (as we contend) such waiting time is properly included within "time spent in deadhead transportation," the specific provisions of Section 21103(b)(4) must supersede Section 21103(b)(1)'s general statement that time on duty "ends when the employee is finally released from duty." Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule.").

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the deadhead time should no longer be counted as time off duty, it does not suggest any change in the understanding that time *on* duty ends prior to the deadhead time.

[22] In other words, petitioners concede that Section 21103(b)(1) simply identifies the beginning and ending points of the period that potentially qualifies as time on duty, but that the proper characterization of different blocks of time within that period is controlled by the further elaboration of the governing principles in the succeeding paragraphs (2) through (7).

4. As noted above, both the *UTU* litigation and the instant case concern only the treatment of time during which crew members are awaiting the arrival of a deadhead vehicle to take them to their place of final release and have in fact been relieved of *all* duties. The FRA has always taken the position that, if crew members awaiting a deadhead vehicle are obliged to perform any duties for the railroad during that time—including such relatively passive duties as observing passing trains for unsafe conditions, protecting the train they are on from vandalism, or communicating information about the train via radio —they will be considered to be on duty. See Pet. App. 37a-40a (letter of Aug. 4, 1989); J.A. 160 (*Federal Register* notice of Apr. 8, 1993); Pet. App. 31a (letter of Mar. 1, 1995).

As in the courts of appeals, petitioners argue at length that various duties are "typically" imposed upon crew members while they await the arrival of the deadhead vehicle. The record in this case, however, contains no support for that assertion. Petitioners instead rely upon factual materials submitted to the Oregon district court in one of the cases that resulted in the Ninth Circuit's *UTU* ruling. Pet. Br. 6 n.5. Even assuming that such materials are judicially noticeable in the present litigation, they are simply irrelevant to the legal issue at hand. The court of appeals did not purport to determine the proper classification of time during which waiting crew members are called upon to perform additional duties. Pet. App. 11a n.4.[23] Nor need this Court give

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[23] The court acknowledged in passing that time spent by train crew members performing "additional, non-operational, duties" would presumably be counted as time on duty pursuant

any consideration to petitioners' factual allegations, or to any attempt the railroads may make to refute those generalized assertions. The present case concerns the correct treatment of time waiting for a deadhead vehicle where crew members are *not* called upon to perform other services; allegations that crew members *are* required to perform services in particular instances can and should be dealt with in future enforcement proceedings by the FRA if the railroads involved fail to treat those periods as time on duty.

5. In concluding (in *UTU*) that the waiting time at issue here is properly characterized as time on duty, the Ninth Circuit relied in part on the supposed existence of "certain contingent responsibilities" retained by crew members awaiting deadhead transportation. 975 F.2d at 1428. It is less than clear what the court meant by that phrase, but there are at least two possibilities. First, the court might have been responding to (and accepting) the unions' assertions about the duties "typically" imposed upon waiting crew members. If so, the court erred for the reason stated above—*i.e.*, it misconstrued the issue properly before it and assumed the answer to factual inquiries that should have been left to individual enforcement actions. A second possibility is that the Ninth Circuit believed the existence of "contingent responsibilities" to be inherent in the waiting situation, in the sense that employees under the direction and con-

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to the commingled service provision, 49 U.S.C. 21103(b)(3) (App., *infra*, 3a). Pet. App. 11a n.4. Depending upon the type of duty performed, either the commingled service provision or that regarding activities "connected with the movement of a train" (49 U.S.C. 21103(b)(2) (App., *infra*, 3a)) would indeed apply to such time.

trol of the railroad are always subject to the *possibility* of being recalled to duty, to deal (for example) with an arising emergency. If that is what the court meant, then it committed a substantive error that would seriously disrupt the statutory scheme. The possibility of unanticipated emergencies is always present in train operations, and even crew members already moving in the deadhead vehicle *might* be called upon to assist in dealing with such an exigency. The mere possibility of such an event is, we submit, too tenuous a basis to convert what would otherwise be limbo time into time on duty. If particular crew members awaiting or traveling on the deadhead vehicle are actually required to perform services, either to respond to an emergency or otherwise, the time in question is time on duty.[24] But so long as an employee is not obliged to perform any service while awaiting the arrival of a deadhead vehicle, such time should be considered part of deadhead transportation, and hence limbo time.

C. Neither The Implementation Of The HSA Prior To 1969 Nor The Legislative History Of The 1969 Amendments Supports Petitioners' Contention That The Waiting Time At Issue Here Is Time On Duty

Both in the present case and in the earlier *UTU* litigation, petitioners have attempted to invoke the legislative history, and other supposed indications of pre-1969 understandings or practice, in support of

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[24] However, as previously noted (see note 2, *supra*), the statutory limitations on hours of service would not apply in the case of certain emergency situations. See 49 U.S.C. 21102(a) (App., *infra*, 1a-2a).

their position. As noted above (see pages 18-19, *supra*), the 1969 Senate Report's statement that time spent in deadhead transportation to a duty assignment should be "calculated from the time [the employee] reports for duty" (*1969 Senate Report* 8) offers significant support for the FRA's conclusion that waiting time is included within "time spent in deadhead transportation." And several statements by witnesses during the hearings preceding the 1969 amendments appear to reflect the view that time spent waiting for a deadhead vehicle to transport the crew back from its final duty assignment was not time on duty under the HSA as in effect prior to 1969. See *Hours of Service Act Amendments of 1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 114-115, 178-179 (1969) (*1969 Hearings*). By contrast, the legislative history offers no affirmative support for petitioners' position.

1. Petitioners' reference to the general remedial goals of the original 1907 enactment, and to the intent of Congress in 1969 to deal with "abuses" regarding the treatment of deadheading as time off duty (Pet. Br. 18-19), sheds no light on the interpretive issue presented in this case. Such reliance on the "'broad purposes' of legislation * * * ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986). Even if the 1969 HSA amendments can be said to reflect a generalized congressional intent to "close loopholes" and make the Act's protections stronger (Pet. Br. 16, 20), Members of Congress "may differ sharply on the means for effectuating that intent, [and] the final

language of the legislation may reflect hard-fought compromises." *Dimension Financial*, 474 U.S. at 374. In the case of the 1969 amendments, legislative compromise clearly took place between introduction of a bill that would have treated *all* deadheading as time on duty,[25] and final enactment of the provision distinguishing between deadheading to and from duty, with the latter treated as limbo time. See *1969 House Report* 7-8 (quoted at note 5, *supra*).

2. Petitioners' reliance on two snippets from the lengthy hearings held in 1969 is also misplaced. Even if the statements at issue provided reliable indicia of congressional intent, they would furnish no support for petitioners' position in the instant case. In the initial passage (see Pet. Br. 19-20), a railway labor representative discussed an egregious example of the consequences of treating deadheading as *off-duty* time, noting that a crew had been required to work a second shift following an off-duty period that consisted chiefly of an opportunity for "rest" in a caboose. See *1969 Hearings* 30. In the second passage (see Pet. Br. 20-21), a railroad representative discussed the anticipated deleterious effects of treating deadhead transportation from a duty assignment as time *on duty*, as the bill then under consideration would have done. See *1969 Hearings* 134-135; note 25, *supra*. Congress's ultimate decision to treat such deadheading time as neither on- nor off-duty time avoided both of the dangers to which those witnesses referred. Moreover, the testimony upon which peti-

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[25] See H.R. 8449, 91st Cong., 1st Sess., § 1 (1969), *reprinted in 1969 Hearings* 2 (amending Section 61(b)(3)(C) to provide that "[t]ime spent in deadhead transportation by an employee to or from duty assignment" shall be included in on-duty time).

tioners rely did not address (or have logical implications for) the question whether time spent waiting for a deadhead vehicle is properly regarded as time spent in deadhead transportation.

3. The Ninth Circuit in *UTU* believed that, "[a]t the time of the 1969 amendments to the HSA, it was clear that time spent waiting for the arrival of deadhead transportation bearing a relief crew was 'time on duty' under the statute." 975 F.2d at 1426-1427. That court treated as pivotal the purported lack of congressional intent to "change the established rule regarding the treatment of waiting time." *Id.* at 1427; see Pet. Br. 21-22. The Seventh Circuit in the present case, by contrast, accepted the railroads' contention that Congress in 1969 had reason to know that "this waiting time was never treated as on-duty time." Pet. App. 13a.

In our view, such considerations fail to add appreciable support to either side of the debate. Although Congress is presumed to be aware of judicial or administrative interpretations of existing laws, see, *e.g.*, *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1030 (1994), Congress cannot be said to have acted against the backdrop of a "settled construction" of the HSA in 1969, see *id.* at 1032-1033. In only one reported decision prior to 1969 did a court address the treatment of time waiting for deadhead transportation at the end of the crew members' duty; at the urging of the Interstate Commerce Commission, which preceded the FRA as the agency charged with enforcement of the HSA, a district court held the particular waiting period that was the subject of the enforcement action to be time on duty. See *United States* v. *Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967). That decision, moreover, can be read to turn on its particular facts without stating a categorical legal rule (see *id.* at 348-349; cf. J.A. 62-63 (1977 FRA description of *Pennsylvania Railroad* case)), and it was not cited in the legislative history of the 1969 amendments. In any event, it is clear that Congress intended in 1969 to alter the governing statutory framework, by replacing the implicit dichotomy between on-duty and off-duty time with an express tripartite scheme. Judicial and administrative practice during an era when limbo time did not exist can be of little assistance in determining the proper contours of that category of time. There is consequently no basis for believing either that Congress understood there to be a clearly established rule treating time spent waiting for the deadhead vehicle at the conclusion of a duty assignment as time on duty, or that Congress intended to perpetuate such a rule.[26]

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[26] The FRA has taken the position that *Pennsylvania Railroad* was correctly decided under the pre-1969 statutory scheme, but that it cannot control the interpretation of the HSA in its current form. Prior to 1969, the HSA made no provision for limbo time; all time was either on duty or off duty. As a consequence, a lengthy period spent waiting for a deadhead vehicle (*i.e.*, ten hours or more) would have counted as the full amount of required time off duty, and would thus have allowed the railroad to put the crew back into service. Treating waiting time as time on duty would have guarded against such a result under the pre-1969 Act, but the same protection is now afforded simply by treating such waiting periods as limbo time.

None of the other decisions upon which petitioners rely (see Pet. Br. 25-27) involved time spent awaiting the arrival of a deadhead vehicle. The waiting time at issue in *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112 (1913), occurred while the "engine was sent off for water and repairs." *Id.* at 119. It is

D. To The Extent That The Court Finds The HSA Ambiguous, It Should Adopt The FRA's Reasonable Interpretation And Reject Petitioners' Invitation To Expand The Act's Coverage Based On Policy Considerations

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[27] Petitioners err in asserting (Pet. Br. 23) that the FRA's views deserve no weight on the

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apparent that the crew was expected to resume duties following the waiting period at issue—a situation that the FRA would clearly consider to be time on duty today. See 49 U.S.C. 21103(b)(4) and (5) (App., *infra*, 3a). *United States* v. *Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917), and *Northern Pacific Ry.* v. *United States*, 220 F. 108 (9th Cir. 1915), both addressed the question whether short interim periods of inactivity were sufficient to break the continuity of the employees' service. In *San Pedro, L.A. & S.L.R.R.* v. *United States*, 213 F. 326 (8th Cir. 1914), all the crew members except the fireman were relieved of all responsibilities when the train was tied up short of its destination; the fireman was required to watch the engine and to keep it in operation until the relief crew arrived. *Id.* at 327. The fireman, but not the rest of the crew, was considered to be on duty during that period. Exactly the same result would be reached under the FRA's interpretation of the present version of the HSA.

[27] Congress amended the Hours of Service Act on five separate occasions between 1969 and 1992 (in 1976, 1978, 1980, 1988, and 1992), the year in which the Ninth Circuit issued its decision in *UTU* and the FRA changed its interpretation of the pertinent statutory provision. Congress never took action, however, to direct a different treatment of time spent waiting for the deadhead vehicle.

ground that the agency has "waffled" in its approach to the interpretive issue now before the Court.[28] In fact, as the concurring judges in the court below recognized, there has been consistent logic to the FRA's approach. See Pet. App. 17a-18a. The agency has never regarded the unions' position on the issue at hand as the more persuasive reading of the pertinent statutory language; rather, it attempted to acquiesce in the Ninth Circuit's ruling chiefly because of the high value it ascribed to nationwide uniformity. *Ibid.*; see *id.* at 30a (letter of Mar. 1, 1995, explaining reasons for earlier position).[29] After the Seventh Circuit's ruling in this case, however, the FRA recognized that it was powerless to effect such uniformity in the absence of action by this Court or Congress. The agency therefore reverted to the po-

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[28] Petitioners' other arguments attacking the FRA's "credibility" are even more impertinent to the matter at hand. The miscellaneous criticisms leveled at the FRA by other government agencies and by journalists (Pet. Br. 24 & n.8) all appear to involve specific incidents or issues that have nothing to do with the FRA's reliability in construing the HSA. Petitioners also go far afield in relying on affidavits, filed in other litigation, by *former* FRA employees offering their views on how the HSA was or should be interpreted (*id.* at 23). The fact that individual employees may have construed a statutory provision in a different manner does not detract from the agency's proper interpretive role.

[29] Nationally uniform application of safety laws is especially important in the railroad industry. Many railroads have operations in several different circuits. In fact, a single train may travel across circuit boundaries, thus creating a situation where the applicable law changes as the train moves. To avoid such situations, Congress has indicated its clear intention that railroad safety laws be "nationally uniform to the extent practicable." 49 U.S.C. 20106.

sition that it had consistently espoused prior to the Ninth Circuit's 1992 ruling—*i.e.*, that time spent waiting for a deadhead vehicle at the conclusion of a duty assignment is most reasonably regarded as "part and parcel" of "time spent in deadhead transportation," and therefore as limbo time. See *id.* at 30a-31a. The FRA's efforts to adapt its policies to a changing legal landscape hardly constitute the sort of unexplained inconsistency that might render judicial deference unwarranted. The agency's current approach—which the court below believed to be mandated by the text of the Act—is surely well within the range of "permissible" statutory constructions that should be upheld when embraced by the agency charged with enforcement of the HSA. See *Chevron*, 467 U.S. at 843-845.

Petitioners also point out that the HSA does not permit the FRA to exercise legislative rulemaking authority—*i.e.*, the sort of authority that would enable it to impose on the railroads substantive requirements beyond those expressly established by the Act itself. See Pet. Br. 24.[30] There is considerable

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[30] The FRA has consistently acknowledged that it lacks substantive rulemaking authority over hours of service issues, and that its statements regarding the proper classification of time awaiting the deadhead vehicle are interpretive rules. See, *e.g.*, J.A. 159. The court below took note of that fact, opining that the interpretive nature of the actions at issue affected the *degree* of deference it was willing to afford. Pet. App. 8a-9a; see also *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991) (interpretive rules accorded deference under *Chevron*), cert. denied, 503 U.S. 970 (1992); accord *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

irony in that observation, in light of petitioners' extensive arguments elsewhere that *this Court* should base its ruling on an open-ended assessment of public safety concerns. See *id.* at 29-37. Thus, petitioners discuss a number of governmental and academic studies—most of which are not in the record of the present litigation—dealing with general issues of worker fatigue, particularly issues concerning the possible long-term effects of irregular work schedules. *Ibid.*

The HSA contains no provision, however, governing the regularity of train crew hours, and the FRA has previously explained that its lack of substantive rulemaking authority precludes it from going beyond the terms of the HSA to address even arguably related work-hours issues. See Pet. App. 41a. The agency has recognized, to be sure, that particularly long delays awaiting the arrival of a deadhead vehicle may contribute to an employee's cumulative fatigue, see *id.* at 32a-33a, but long periods spent in the deadhead vehicle itself may produce the same sort of fatigue, and petitioners concede that such periods are nevertheless excluded from time on duty. In any event, such considerations cannot support an interpretation of the HSA's terms contrary to that dictated by traditional principles of statutory construction. Petitioners have presented no sound basis for this Court to depart from the terms of the Act and the FRA's reasonable interpretation of it in order to advance related but distinct policy goals that Congress has not seen fit to address. Petitioners' assertions regarding irregular work schedules and cumulative fatigue may raise important safety issues

worthy of public debate,[31] but they have no bearing on the question of statutory interpretation presented by this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1995

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[31] Among the materials cited by petitioners in this regard are instances of testimony presented to congressional committees. Pet. Br. 33-34. That, we submit, is precisely where such presentations belong—before the body that has the authority to address such public safety concerns. As noted above, moreover, lengthy rides in a deadhead vehicle may create the same disruption of employee work schedules, yet Congress has consistently declined to limit the duration of such journeys.

APPENDIX

CHAPTER 211—HOURS OF SERVICE

§ 21101. Definitions

In this chapter—

(1) "designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) "dispatching service employee" means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) "employee" means a dispatching service employee, a signal employee, or a train employee.

(4) "signal employee" means an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.

(5) "train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

§ 21102. Nonapplication and exemption

(a) GENERAL.—This chapter does not apply to a situation involving any of the following:

(1) a casualty.

(2) an unavoidable accident.

(3) an act of God.

(4) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(b) EXEMPTION.—The Secretary of Transportation may exempt a railroad carrier having not more than 15 employees covered by this chapter from the limitations imposed by this chapter. The Secretary may allow the exemption after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.

§ 21103. Limitations on duty hours of train employees

(a) GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—

(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time the employee is engaged in or connected with the movement of a train is time on duty.

(3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) EMERGENCIES.—A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this subsection, an emergency ends when the track is cleared and the railroad line is open for traffic.

§ 21104. Limitations on duty hours of signal employees

(a) GENERAL.—(1) In paragraph (2)(C) of this subsection, "24-hour period" means the period beginning when a signal employee reports for duty immediately after 8 consecutive hours off duty or, when required under paragraph (2)(B) of this subsection, after 10 consecutive hours off duty.

(2) Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a signal employee to remain or go on duty—

(A) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours;

(B) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(C) after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.

(3) Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters, is neither time on duty nor time off duty, except that up to one hour of that time spent returning from the final trouble call of a period of continuous or broken service is time off duty.

(4) If, at the end of scheduled duty hours, an employee has not completed the trip from the final outlying worksite of the duty period to the employee's headquarters or directly to the employee's residence, the time after the scheduled duty hours necessarily spent in completing the trip to the residence or headquarters is neither time on duty nor time off duty.

(5) If an employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with this section, the time necessary for the trip from the worksite to the employee's headquarters or directly to the employee's residence is neither time on duty nor time off duty.

(6) Time spent in transportation on an ontrack vehicle, including time referred to in paragraphs (3)-(5) of this subsection, is time on duty.

(7) A regularly scheduled meal period or another release period of at least 30 minutes but not more than one hour is time off duty and does not break the continuity of service of the employee under this section, but a release period of more than one hour is time off duty and does break the continuity of service.

(c) EMERGENCIES.—A signal employee may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service.

§ 21105. Limitations on duty hours of dispatching service employees

(a) APPLICATION.—This section applies, rather than section 21103 or 21104 of this title, to a train employee or signal employee during any period of time the employee is performing duties of a dispatching service employee.

(b) GENERAL.—Except as provided in subsection (d) of this section, a dispatching service employee may not be required or allowed to remain or go on duty for more than—

(1) a total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed; or

(2) a total of 12 hours during a 24-hour period in a tower, office, station, or place at which only one shift is employed.

(c) DETERMINING TIME ON DUTY.—Under subsection (b) of this section, time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is on duty in a tower, office, station, or other place is time on duty in that tower, office, station, or place.

(d) EMERGENCIES.—When an emergency ex-ists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours for not more than 3 days during a period of 7 consecutive days.

§ 21106. Limitations on employee sleeping quarters

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

§ 21107. Maximum duty hours and subjects of collective bargaining

The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

* * * * *

CHAPTER 213—PENALTIES

SUBCHAPTER I—CIVIL PENALTIES

* * * * *

§ 21303. Chapter 211 violations

(a) PENALTY.—(1) Subject to section 21304 of this title, a person violating chapter 211 of this title is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. For a violation of section 21106 of this title, a separate violation occurs for each day a facility is not in compliance.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least $500 but not more than $10,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than $20,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) CIVIL ACTIONS TO COLLECT.—(1) The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section after satisfactory information is presented to the Attorney General. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an

individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action under this subsection must be brought not later than 2 years after the date of the violation unless administrative notification under section 3711 of title 31 is given within that 2-year period to the person committing the violation. However, even if notification is given, the action must be brought within the period specified in section 2462 of title 28.

(c) IMPUTATION OF KNOWLEDGE.—In any proceeding under this section, a railroad carrier is deemed to know the acts of its officers and agents.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,
v.
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*
and
FEDERICO PENA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

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**On Writ of Certiorari to the
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REPLY BRIEF FOR THE PETITIONERS

We submit that for the Court to rule in favor of the Respondents [1] it will need to reach such exclusion by:

1. Excluding some of the express statutory language relating to interim rest periods, commingled service, and the point at which an employee is finally released from duty.
2. Giving the safety statute a strict interpretation, rather than a broad meaning in light of its humane purpose as intended by Congress.
3. Not acknowledging that an employee is not "finally released" from duty until he/she reaches the designated terminal after deadhead transportation has occurred.

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[1] The federal respondents will sometime be referred to as "FRA", and the railroad respondents will be referred to as "Railroads".

4. Not giving adequate weight to the serious safety implications.
5. Assuming a worker's fatigue ends at the completion of 12 hours of work and has no impact on a subsequent work day, and irrespective of the regularity of the next work cycle and cumulative fatigue.
6. Not accepting the concept behind the HSA [2] that all time is time on duty unless specifically excluded.

In this reply brief, we will discuss, as relevant, the specific sections of the HSA that Respondents challenged.

First, there are areas where there appears to be agreement between the Petitioners and at least one of the Respondents. These are:

1. In determining whether waiting time is included within "time spent in deadhead transportation," the Court should not view that phrase in isolation. It should consider it in context, looking "to the provisions of the whole law, and to its object and policy." (Fed. Br. 16).[3]
2. The overriding purpose of the HSA is "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." (Fed. Br. 17).
3. If crew members awaiting deadhead transportation are obliged to perform any duties for the railroad during that time—including such relatively passive duties as observing passing trains for unsafe conditions, protecting the train from vandalism, or communicating information about the train via radio—they will be considered to be on duty. (Fed. Br. 25).

[2] "HSA" is the Hours Of Service Act.

[3] "Fed. Br." refers to the Brief of Federal Respondents.

4. *United States v. Pennsylvania R.R.*, 275 F.Supp. 345 (W.D. Pa. 1967) was correctly decided under the pre-1969 statutory scheme. (Fed. Br. 31 fn. 26).

In virtually each section discussed by the Respondents, they seek to restrict its scope and coverage to only a partial work day encountered by a railroad worker. The overriding focus of their arguments is that each section should be read to encompass various exclusions.

I. THE RESPONDENTS ARE MISLEADING THE COURT IN STATING THAT AN EMPLOYEE IS FINALLY RELEASED FROM DUTY PRIOR TO DEADHEAD TRANSPORTATION.

Application of 49 U.S.C. § 21103(b)(1)

The FRA attempts to refute the Petitioners' argument (Pet. Initial Br. 15) that the time on duty ends when the employee is *finally released* from duty. The FRA reasons that it is more logical that the employee is finally released from duty at the point at which he/she is finally relieved of responsibility to perform *operational* services for the railroad. It suggests that such point precedes rather than follows the deadhead transportation at issue here. (Fed. Br. 22-23; see also R.R. Br. 18-19).[4,5] The

[4] "R.R. Br." refers to the Brief of the railroads.

[5] The railroads are seeking to have the Court draw an inference from the fact that the petitioners unsuccessfully sought legislative changes to the HSA subsequent to 1969 to deal with the issue here and to reduce the maximum hours of work. (R.R. Br. 11-12, 28, 30, 36). As should be obvious to the railroads, who appear before Congress on a regular basis, there are various reasons why legislation is proposed and just as many different reasons why legislation may not be adopted. If the Court drew the inference sought by the railroads here, it would prevent persons from ever seeking helpful clarification of statutes by Congress. Literally thousands of bills and amendments are proposed in Congress annually. Failure of Congress to affirmatively act

railroads state that once the railroad instructs an employee to cease all duties, the employee has then been finally released from duty regardless of whether the train has reached a terminal. The plain reading of section 21103(b)(4) shows that deadhead transportation from a duty assignment ends at the *place of final release*. That place of final release cannot be located at a point before deadhead transportation begins or (b)(4) would make no logical sense.

The Court need only to look, as an example, at the Atchison, Topeka & Santa Fe Railway Company's System General Orders covering hours of service (paragraph 76) which unequivocally states that the point of *final release* does not occur until *after* deadhead transportation.

> (B) If transportation is not available upon expiration of 12 hours on duty, the ruling requires that we report all time spent awaiting the arrival of transportation at the point where a crew has been on duty for 12 hours. This means that if the vehicle or train to be utilized to transport the crew *to the point of final release* has not arrived when 12 hours on duty time has elapsed, the amount of time spent awaiting the arrival of such transportation must be reported as excess time on duty. It does not require a report of the time spent in actually transporting the crew to point of final release once the transportation has arrived in the field.

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should not be tantamount to Congressional intent, either for or against a measure, just as no inference may be drawn from a denial of a petition for a writ of certiorari by the Court. The Court has addressed this point by stating that as a general matter it is "reluctant to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719 (1993); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *American Trucking Association, Inc. v. Atchison, Topeka and Santa Fe R.R.*, 387 U.S. 397, 416-418 (1967); *U.S. v. Price*, 361 U.S. 304, 312 (1960).

> In cases where it is anticipated that you will be unable to reach your final destination prior to being on duty 12 hours, it is the conductor's or engine foreman's responsibility to notify the train dispatcher or other appropriate supervisor on a timely basis in order that arrangements can be made for a relief crew as well as transportation to the *point of final release*.
>
> If transportation is not available at the expiration of 12 hours on duty, the conductor must advise the train dispatcher of this fact in order that proper investigation and reporting of the excess service can be completed.
>
> Employees should indicate on their trip tickets the actual time they went on duty. Their "total time on duty" should be the actual time on duty, and if die [sic] under the Hours of Service Law, time in this field should be until transportation first becomes available. After transportation first becomes available and until employees actually go off duty should be reflected in the "time went off duty" field.[6]
>
> App. 1a-3a (Italics Added).

Burlington Northern also clarifies that the final release does not occur until after deadhead transportation. For example General Order No. 4 on the Galesburg Division states:

> Time spent in deadhead transportation to the point of final release is not counted as on duty, or off duty.
>
> (App. 4a)

---

[6] The Court may take judicial notice of the operating rules, timetables, and timetable instructions of the railroads because they are required to be filed with the Federal Railroad Administration pursuant to Title 49 C.F.R. Part 217. The said System General Orders were issued subsequent to the Ninth Circuit decision. However, that has absolutely no import regarding the railroads instructions as to where the point of final release occurs.

Similarly, the Union Pacific Railroad hours of service instructions to employees distinguish the time the employee stops operating the train and the *final* tie up time. (See App. 5a-6a).

Furthermore, both respondents are misleading the Court, in stating that there are no functions to be performed by the employee after the deadhead transportation. The fact is that there are at least some ministerial duties that are required of a crew after deadhead transportation, including the notification by them to crew dispatchers regarding the beginning of the hours of service rest period and completing time slip information total hours for pay purposes. We are unaware of any railroad that doesn't require at least some duty to be performed at the point of final release, the designated terminal. A train delay report notice of Burlington Northern, Superintendent Notice No. 30 dated 8/24/95 states:

> Crews arriving at final terminal must deliver Train Delay Report to depot for confirmation of on line car spots and crew tie-up. This includes but not limited to crews dead of Hours of Service.
>
> (App. 7a).

The Burlington Northern also spells out in some detail what must be done at the end of each tour of duty. In General Order 9 it is mandated that wheel reports and switch lists must be submitted to a clerk or agent at the end of each tour of duty. If the station or terminal has transferred freight and yard office functions, then the information must be faxed. After faxing wheel reports and switch lists, the conductor or switch foreman must call the appropriate clerk to verify that all of the above information have been received. (See App. 8a).

We submit that it is irrefutably clear that the employee is not finally released until after the deadhead transportation is concluded and where the employee finally completes other duties at the designated terminal.

II. WAITING FOR DEADHEAD TRANSPORTATION CONSTITUTES "INTERIM PERIODS AVAILABLE FOR REST".

Application of 49 U.S.C. § 21103(b)(5) & (6)

Both the federal and the railroad respondents argue that the *interim* rest period coverage should be restricted to the period only before a crew actually resumes further *operational duties* (Fed. Br. 20-21; R.R. Br. 16-17). As we previously discussed, an employee may be completely at rest during *any* interim period before being finally released, which is time on duty under the HSA. (Pet. Initial Br. 8-9, 11, 14, 16, 28-29). Here, again, respondents would curtail the applicability of this subsection because they state that the waiting time is not performance of service for the railroad. (Fed. Br. 21-22; R.R. Br. 17). One of the basic principles further supporting our position is that the train crew remains as the crew of the train until finally released from duty at the designated terminal. One does not cease to be a member of the crew, even if temporarily relieved, because the crew is not yet free to begin uninterrupted rest as required by the HSA.

Waiting time is part and parcel of an employee's work day. It occurs because of a situation completely within the railroad's control—its failure to provide a replacement crew in a timely manner, which in some instances require a crew to wait up to 10 hours for deadhead transportation. (See Pet. Initial Br. 7). The FRA has recognized that interim periods available for rest comprehend all time that an employee is in the service of the carrier. It was pointed out in a letter dated June 17, 1980, to the undersigned attorney of record from the Acting Chief Counsel of FRA, that an employee who is called to work from the home terminal to an away-from-home terminal, with the expectation that the employee will be utilized on a return assignment, is in the service of the carrier until his return home. (See App. 9a-12a). The question raised

in the letter concerned interim periods available for rest at terminals and at locations other than terminals. We submit that the interpretation by FRA flies directly in the face of its argument here. The fact is no matter how much the FRA and the railroads protest, an employee is not finally released until he/she reaches the final terminal. See this Brief *supra* at 3-6.

Also, regarding the 1969 hearings testimony[7], the railroads attempt to limit the testimony of their own witnesses. (See R.R. Br. 26-27). While Mr. Manion, the Vice President of the Association of the American Railroads, was testifying about deadhead transportation, he also discussed interim periods available for rest at other than a designated terminal. (See Pet. Initial Br. 20-21). One of these was Section 1(b)(3)(A) of H.R. 8449. This section was the relevant section of the hours of service bill under consideration relating to interim periods for rest. It is codified at 49 U.S.C. § 21103(b)(5) almost verbatim. (*See Hearings on H.R. 8449, H.R. 84, and H.R. 9515 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., Sess. 2 (1969)). From his testimony Mr. Manion obviously was aware that more than one section of the proposed legislation would require that time waiting for deadhead transportation would be considered time on duty, if enacted as the bill was introduced.

III. THE STATUTE MUST BE READ IN ITS ENTIRETY, RATHER THAN PIECEMEAL, IN DECIDING WHETHER TIME WAITING FOR DEADHEAD TRANSPORTATION IS TIME ON DUTY.

As we pointed out in our initial brief (*see* Pet. Initial Br. 17) the fallacy of the Seventh Circuit, in concluding

[7] We acknowledge that the Brotherhood of Locomotive Engineers was not a member of the Railway Labor Executives' Association at the time of the 1969 Hearing on Hours of Service. The union became a member in February 1970. We apologize for the error in the initial brief.

that time waiting for deadhead transportation is not time on duty, is that it focused solely on one section of the Act. All provisions of a statute are intended to have meaning and are to be given effect. (*Id.*). The respondents are following the path of the Seventh Circuit in arguing that the time waiting for deadhead transportation is part and parcel of deahdead transportation. The FRA states that although *transportation* connotes motion, it may be understood to encompass incidental activities that do not themselves involve movement, but are prerequisites to its occurrence. (See Fed. Br. 15). The FRA further contends that the 1969 Senate Report, discussing deadhead transportation to a duty assignment, lends credence to its agreement that deadhead transportation encompasses incidental activities such as waiting time. What the FRA fails to recognize is that Congress did take into consideration incidental activities in 49 U.S.C. § 21103 (b)(2) & (3). The time on duty includes the time the employee is engaged *in or connected with* the movement of the train and time spent in any other service in which the employee is engaged *in or connected with the movement of a train*. Had Congress intended to include the incidental activity of waiting time to be included in deadhead transportation it would have added the words *or conected with* to Title 49 U.S.C. § 21103(b)(4), and that section would have read *time spent in or connected with deadhead transportation*.

The railroads argue that they will face operational difficulties if the Seventh Circuit is reversed. In fact, the alleged operational difficulties that will result are exactly the same as they were presented to Congress in 1969. (See 1969 Hearings at 135 and 199) (see R.R. Br. 26), except that Congress did not agree with the railroads. The railroads say that they could no longer relieve a crew at 11 hours and 59 minutes if waiting time were to be considered as time on duty. That is only partially correct. If deadhead transportation were available and waiting for the crew, the railroad could relieve the

crew legally. Moreover, there is no necessity to work crew members the full 12 hours. Congress set the absolute maximum that a crew could be worked. Also, each major carrier in this country has computer operations and intricate signal systems by which they can determine the location of a crew at almost any point, if they so choose. In almost all instances a railroad could provide for deadhead transportation to be available upon arrival of a train at a certain location.

IV. BOTH THE DOT AND THE RAILROADS HAVE IGNORED THE IMPACT OF CUMULATIVE FATIGUE OF RAILROAD WORKERS.

Both the FRA (Fed. Br. 21) and the railroads (R.R. Br. 14) state that fatigue following train operations poses no danger because the worker is not going to operate the train anymore during that particular tour of duty. We submit that the Respondents are simply putting blinders over their eyes for the sole purpose of trying to justify their arguments in this case. As pointed out in our initial brief (Pet. Initial Br. 29-37), fatigue resulting from irregularity and unpredictability of work hours is a very serious problem in the railroad industry. This safety problem does not conclude each day at the end of an employee's 12 hours of work. It cumulates from day to day. As succinctly stated in testimony of Susan M. Coughlin,[8] then Acting Chairman of the National Transportation Safety Board, in hearings before the House Subcommittee on Transportation and Hazardous Materials regarding the Hours of Service Act, June 10, 1992:

> Between 1986 and 1992 alone, the Safety Board investigated 643 railroad accidents. Human performance factors played a role in 72% of those accidents, and in many cases work/rest issues and fatigue were the causal factors. . . .
>
> . . . .

[8] Prior to becoming a member of the NTSB, Ms. Coughlin was the Deputy Administrator for the Federal Railroad Administration.

> Complicating the unpredictable work schedule, today's crews face increased demands as they are operating trains at higher speeds, over longer distances, and with shorter effective intervals between tours of duty. Smaller crews are operating longer trains on fewer miles of track than existed 20 years ago. As a result, heavier trains are traveling closer together in a more congested environment. These increasingly stringent operating parameters have added stress to the work environment. We don't see this trend changing. Indeed, the demands on crews, dispatchers, and maintenance workers have increased, and as the volume of rail business increases, these demands are likely to increase as well. For these reasons, management and labor must continue to recognize and respond to the effects these changes have on safety. . . . As a result, the *Safety Board has found work load and work/rest issues to be critical factors in accident after accident.* We have completed the investigation of 12 accidents between 1987 and 1991 that involved railroad employees' inattention because of fatigue, and probably sleeping, while on duty—all had crews who had complied with the protector of safety, the Hours of Service Act, in place. . . . (Emphasis added).

Hearings on Railroad Safety Programs (Part 2), Before the House Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, 102nd Cong., 2d Sess. 40-42 (1992).

The FRA at p. 30 attempts to discredit the Ninth Circuit decision.[9] That court treated as pivotal the purported

[9] Both the Federal Respondents and the railroads attempt to disregard everything that precedes the matters before the Seventh Circuit. They want this Court to assume that the facts discovered in the Ninth Circuit litigation do not exist and/or those facts are not relevant here. That simply is not the case. The operating conditions have not changed significantly since the initiation of the litigation in Oregon, and hours of service issues cannot be so cavalierly disregarded. It is a nationwide matter and the attempts

lack of Congressional intent to change the established rule regarding the treatment of waiting time. In contrast, FRA states that the Seventh Circuit accepted the contention that Congress in 1969 had reason to know that waiting time was never treated as on duty time. Yet in the same breath it points out that Congress is presumed to be aware of judicial decisions or administrative interpretations of existing laws. It is curious that the FRA tried to discount the fact that the Government initiated the *U.S. v. Pennsylvania R.R.* case decided in 1967 on this exact point. Furthermore, the FRA acknowledged that the *Pennsylvania R.R.* case was correctly decided under the pre-1969 statutory scheme. (See Fed. Br. 31 fn. 26). Congress, in 1969, as correctly pointed out by the Ninth Circuit, did not change any of the law that was considered to be time *off* duty. It merely added to the situations in which certain time between going on duty and being finally released from duty would be considered time on duty, with the one exception of *traveling in* deadhead transportation being neither time on duty, nor time off duty.

---

by the Respondents to limit the relevant facts is not in the interest of safety. We understand why the Respondents do not want this Court to become aware of the operating rules of the railroads applicable to this issue, or to consider these conflicting determinations within the FRA regarding the issue before this Court.

The railroads criticized the petitioners for not filing a response to the railroads' petition to the FRA to reconsider its nationwide application of the Hours of Service Act subsequent to the Ninth Circuit decision. (See R.R. Br. 7, 9). As pointed out in FRA's statement of policy and interpretation of the railroads petition "Notice and comment procedures are unnecessary with regard to the general statement of policy and interpretation issued by this notice . . ." (J.A. 159). The railroads know there was no formal docket created when the railroads' petition was filed in that the railroads were seeking simply a different interpretation from the one that was previously issued. There was no need for the unions to respond because their views were well known at FRA, and any new filings would have duplicated what was already contained within the FRA's records.

In the 1969 amendments to the HSA, Congress did not narrow the meaning of time *on* duty (as suggested by Respondents). Rather in each instance it placed restrictions on the definition of time *off* duty. Congress in every change to the HSA strengthened the protections afforded railroad workers. For example, deadhead transportation had been previously considered time *off* duty. Congress redefined it by treating some travel as *on* duty, and some as limbo time (neither *on* nor *off* duty). In treating interim periods of rest, which was previously considered time *off* duty, the amendments defined this as time *on* duty. There is not one aspect of the 1969 amendments which suggests that any time previously considered time *on* duty was converted to time *off* duty, or were protections weakened in any way. In fact, Congress only strengthened the protections for the employees.

CONCLUSION

For all of the aforesaid reasons, the decision of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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October 20, 1995

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APPENDICES

APPENDIX A

THE ATCHISON, TOPEKA & SANTA FE RAILWAY

SYSTEM GENERAL ORDERS

1995

* * * *

76. HOURS OF SERVICE

(A) . . . .

(B) If transportation is not available upon expiration of 12 hours on duty, the ruling requires that we report all time spent awaiting the arrival of transportation at the point where a crew has been on duty for 12 hours. This means that if the vehicle or train to be utilized to transport the crew to the point of final release has not arrived when 12 hours on duty time has elapsed, the amount of time spent awaiting the arrival of such transportation must be reported as excess time on duty. It does not require a report of the time spent in actually transporting the crew to point of final release once the transportation has arrived in the field.

In cases where it is anticipated that you will be unable to reach your final destination prior to being on duty 12 hours, it is the conductor's or engine foreman's responsibility to notify the train dispatcher or other appropriate supervisor on a timely basis in order that arrangements can be made for a relief crew as well as transportation to the point of final release.

If transportation is not available at the expiration of 12 hours on duty, the conductor must advise the train dispatcher of this fact in order that proper investigation and reporting of the excess service can be completed.

Employees should indicate on their trip tickets the actual time they went on duty. Their "total time on duty" should be the actual time on duty, and if die [sic] under the Hours of Service Law, time in this field should be until transportation first becomes available. After transportation first

becomes available and until employees actually go off duty should be reflected in the "time went off duty" field.

* * * *

APPENDIX B

BURLINGTON NORTHERN RAILROAD

GENERAL ORDER NO. 4

Division Galesburg

Subdivision All

Date 4/2/95

The conductor is responsible for completing the appropriate parts of the delay report at the time they are accomplished. In situations where the conductor deadheads to the point of final release, the final off duty time must be filled in upon arrival and faxed to the proper office in order for the Burlington Northern to determine when the conductor can be next called for duty. Time spent in deadhead transportation to the point of final release is not counted as on duty or off duty deadhead.

General Orders in effect: 1 through 4.

APPENDIX C

UNION PACIFIC RAILROAD
HOURS OF SERVICE DEPARTMENT
850 JONES ST., OMAHA, NE 68102-2920

PLEASE READ AND KEEP THIS REFERENCE GUIDE FOR CORRECT TIE-UP PROCEDURE EFFECTIVE 3/6/95:

IF YOU NEED FURTHER INFORMATION, PLEASE CALL 1-800-877-0309, PUSH YOUR NORMAL OPTION AT THE PROMPT AND ASK THE SUPERVISOR WHO ANSWERS TO TRANSFER YOU TO EXTENSION 7364 OR, FROM A COMPANY PHONE, DIAL 8-636-7364.

1. *EFFECTIVE 3/6/95, FRA REGULATIONS SAY THAT HOURS OF SERVICE TIME DOES NOT STOP UNTIL YOU ARE RELIEVED OF RESPONSIBILITY FOR THE TRAIN.* (NOTE: THIS DOES NOT APPLY IN THE WESTERN STATES OF CA, OR, WA, NV, ID & MT)

2. WHEN USING THE =TE FUNCTION IN THE COMPUTER PLEASE CORRECTLY FURNISH BOTH THE "ODT" AND "FTU" TIMES AS SHOWN BELOW. REMEMBER, THEY CAN NEVER BE THE SAME, AS EVEN WHEN WALKING IN IT TAKES SEVERAL MINUTES TO GET TO THE TIE-UP POINT.

3. *IF YOU HAVE TO CALL IN YOUR TIE-UP TO CMS OR A TIE-UP RECORDER, PLEASE SPECIFY WHAT TIME BOTH ODT & FTU ARE TO READ.*

4. *"ODT" IS THE TIME YOU WERE RELIEVED OF RESPONSIBILITY FOR THE TRAIN.* THIS FIELD IS A FRA FIELD WHICH STANDS FOR "OFF DUTY TIME FOR HOURS OF SERVICE PURPOSES ONLY" AND DOES NOT EFFECT YOUR PAY OR WHEN YOUR REST STARTS. IT'S ONLY PURPOSE

IS TO TELL THE FRA WHAT TIME YOU WERE RELIEVED OF RESPONSIBILITY FOR THE TRAIN, AND HOW MANY HOURS REST YOU GET. THIS TIME IS REQUIRED BY FEDERAL LAW. (NOTE: PER COURT RULING 3/6/95, THIS IS THE TIME YOU STOP OPERATING THE TRAIN AND *IS NOT* THE TIME TRANSPORTATION PICKS YOU UP.)

5. *"FTU" IS YOUR FINAL TIE UP TIME.* IT IS THE TIME YOU LEAVE THE TIE-UP POINT FOR HOME. IT STOPS YOUR PAY AND STARTS YOUR REST.

6. "P/U CIRC7"—MAKE SURE YOU PUT A "Y" IN "WAS CREW TRANSPORTED TO FINAL TIE-UP POINT", (DO THIS EVEN IF YOU WALK IN). THIS BRINGS UP ANOTHER SCREEN IN WHICH YOU ENTER THE CIRC-7 OF THE POINT YOU WERE PICKED UP. IF NO CIRC-7 EXISTS FOR THAT LOCATION, PLEASE ENTER IN THIS FIELD THE CIRC-7 YOU LAST PASSED THRU BEFORE GOING DEAD. THEN ENTER THE MODE OF TRANSPORTATION (IF YOU WALKED IN, TYPE "WALKED IN" IN THE COMMENT FIELD) AND THE TIME YOU REACHED FINAL DESTINATION BY THIS TRANSPORTATION.

FOLLOWING THE ABOVE PROCEDURES WILL RESULT IN LESS INSTANCES OF INACCURATE REPORTING OF HOURS OF SERVICE VIOLATIONS TO THE FRA.

APPENDIX D

BURLINGTON NORTHERN RAILROAD

SUPERINTENDENT NOTICE NO. 30

DIVISION: Willmar

Subdivision: All

Division Superintendent: R. C. Ellis

Notice in Effect: 1-18, 20-22, 24-30

Notices Cancelled:

Date: 08-24-95

SUBJECT: TRAIN DELAY REPORTS

Crews arriving at final terminal must deliver Train Delay Report to depot for confirmation of on line car spots and crew tie-up.

This includes but not limited to crews dead of Hours of Service.

APPENDIX E

BURLINGTON NORTHERN RAILROAD

GENERAL ORDER NO. 9

Division Galesburg

Subdivision All

Date 05/16/95

All Locations

* * * *

Wheel reports and switch lists must be submitted to a clerk or agent at the end of each tour of duty. If a station or terminal has transferred freight and yard office functions to a centralized agency center, for example, Ft. Worth Customer Support Center, conductors and switch foremen must fax all accurately documented wheel reports and switch lists to that Customer Support Center. After faxing wheel reports and switch lists, the conductor or switch foreman must call the designated clerk or specialist that provides service for your respective division or terminal in order to certify that all lists have been received, are legible, and have been completed properly. This information is necessary to maintain expedient service to our customers, maintain proper records for car movement, and to support billing charges due BN.

Signature indicating that conductor or switch foreman has performed the work and has entered and completed the information, as required, above, on wheel reports and/or switch lists (including work that was left undone).

* * * *

APPENDIX F

[DOT Logo]

Office of
the Chief Counsel

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Washington, D.C. 20590

[Jun. 17, 1980]

Lawrence M. Mann, Esq.
Alper, Schoene, Horkan & Mann
818 Eighteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Mann:

This will respond to your letter of May 7, 1980, concerning interim periods of release under the Hours of Service Act, as amended. We have reviewed the instructions quoted in your letter and find them to be inconsistent with the requirements of the Act.

One of the purposes of the Act is to assure that employees receive release periods under circumstances that are reasonably conducive to meaningful rest. Read in that light and in light of congressional hearings and debates that layed the foundation for the 1969 amendments to the Act, the term "interim periods available for rest" clearly comprehends statutory periods of release of eight or ten hours provided while an employee is in the service of the carrier. Just as clearly, a employee who is called to work from the home terminal to an away-from-home terminal, with the expectation that the employee will be utilized on a return assignment, is in the service of the carrier until his return home. Whether or not the employee is entitled to compensation for that period, and whatever its duration in excess of four hours, such a release is an "interim release" between periods of covered service. Any such release may be provided at a place other than a

designated terminal only if one of the statutory exceptions is satisfied.

The necessity of this conclusion can be demonstrated by example. If the "designated terminal" provision may be evaded by providing release periods of eight or ten hours, such release periods may be provided at any place the railroad chooses. A train crew in through freight service could be "released" at any siding on the line of haul. Under this rationale, the absence of facilities for food and lodging would be no bar to returning the crew to service for a full twelve-hour period after eight or ten hours in a caboose or locomotive cab. Obviously, it is precisely such abuses that resulted in enactment of the present statutory restrictions.

Sincerely,

/s/ Michael T. Haley
MICHAEL T. HALEY
Acting Chief Counsel

Law Offices
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818 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 298-9191

May 7, 1980

Raymond James
Chief Counsel
Federal Railroad Administration
400 7th Street, S.W.
Washington, D.C.

Dear Mr. James:

My clients have been advised that a certain railroad has released the following instructions to its operating officers:

> "Regarding tying up train and engine crews on Hours of Service Law other than designated terminals.
>
> "The Hours of Service Act is rather convoluted, but the relevant position of the statute presently reads as follows:
>
> "3. Time on duty shall commence when an employee reports for duty and terminates when the employee is finally released from duty, and shall include:
>
> "(A) Interim periods available for rest at other than a designated terminal.
>
> "This language was added to the Act in 1969; it was unaffected by the 1978 amendment defining 'designated terminal'.
>
> "The statute contains no definition whatsoever of when an employee is 'finally released from duty'. The entire issue of designated terminal is material only to whether a period of 'interim rest' is counted

as time on duty. The structure of the statute shows that interim refers to periods between reporting for duty and final release.

"Strictly speaking, nothing in the Hours of Service Act precludes giving employees their final release for ten hours at a point other than a designated terminal, even though we may expect a challenge to this interpretation from certain individuals and organizations.

"Therefore, you may amend your current practice and tie up a crew for a full ten-hour rest at other than home or away-from-home terminals when the crew had 'died on the law' provided suitable eating and lodging facilities are available."

My question is whether or not the last sentence as quoted above in the opinion of FRA violates the Hours of Service Act.

It is my understanding that the said carrier has put the above instructions into effect. Therefore, your prompt attention to this issue would be appreciated.

Very truly yours,

/s/ Lawrence M. Mann
LAWRENCE M. MANN

cc: J. R. Snyder
J. L. Easley

(9)

No. 94-1592

Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., *et al.*,

and

FEDERICO PEÑA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS SUPPORTING RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., *et al.*,

and

FEDERICO PEÑA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS SUPPORTING RESPONDENTS

INTEREST OF AMICUS

The Association of American Railroads (AAR) is a voluntary, nonprofit trade association whose members account for 75% of the total line-haul mileage, produce 93% of the total freight revenues, and employ 91% of the 213,000-person freight-railway workforce in the United States.[1] AAR represents its members on matters of common concern before Congress, before regulatory agencies, and in an *amicus* capacity before the courts. The issue at stake here—the proper interpretation of "time on duty"

---

[1] Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

under the Hours of Service Act, 49 U.S.C. § 21103 ("the HSA" or "the Act")[2]—is one such matter of common concern, as it could substantially affect the operations of railroads throughout the United States.

STATEMENT OF THE CASE

In 1992 the United States Department of Transportation's Federal Railroad Administration (FRA) reversed its longstanding position and contradicted 85 years of industry practice by reinterpreting "time on duty," within the meaning of the Hours of Service Act of 1907. Under the FRA's 1992 interpretation, "time on duty" includes the time that train crew members spend after they have completed their duty assignment and have been relieved from all train-operating responsibilities, but before the railroad begins transporting them to their place of final release. *See* 58 Fed. Reg. 18,163 (1993); J.A. 73-77 (Letter from FRA Chief Counsel S. Mark Lindsey to Robert W. Blanchette (Oct. 28, 1992)). Respondent railroads petitioned the United States Court of Appeals for the Seventh Circuit for review of the FRA's new interpretation. On December 29, 1994, the Seventh Circuit, sitting *en banc*, unanimously held that time spent waiting for "deadhead transportation"[3] from a duty assignment to the place of final release is *not* "time on duty" under the HSA. 44 F.3d 437, 445. Although the FRA and the Department of Transportation have subsequently reverted to their initial position and now join this case as respondents (on the side of the railroads), the Brotherhood of

[2] When this suit was commenced, the Act was codified at 45 U.S.C. §§ 61-64b. In 1994 the Act was recodified at 49 U.S.C. §§ 20102, 21101-21108, 21303-21304. (Only § 21103 is at issue here.) Congress intended the recodification to effect no substantive changes in the law. *See* § 6(a), 108 Stat. 1378 (1994); H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[3] When a railroad moves its train crews to or from a duty assignment, it is known as "deadhead transportation."

Locomotive Engineers and the United Transportation Union ("the Unions") continue to oppose the Seventh Circuit's interpretation of the Act.

SUMMARY OF ARGUMENT

1. Congress enacted the Hours of Service Act in 1907 to promote railroad safety by limiting the number of consecutive hours that certain train employees (including locomotive engineers, conductors, and brakemen) may remain on duty and by allowing those employees to get adequate periods of rest before returning for their next shift. The current version of the Act divides employees' time into three categories: time on duty, time off duty, and so-called "limbo time." Employees (1) may remain on duty for no more than 12 consecutive hours, and having worked for that period, must then be given at least 10 consecutive hours off duty, and (2) must be given at least 8 consecutive hours off duty in every 24-hour period. 49 U.S.C. § 21103(a). Once a train crew has been on duty for 12 consecutive hours without reaching its destination, it has "expired" and can no longer lawfully operate the train. At or shortly before the time when the 12 hours elapse, the train is "tied up" (*i.e.*, parked and secured), and then the "expired" or "outlawed" crew waits (either on the train or elsewhere) for a van, another train, or some other form of transport to bring a relief crew and to pick up the expired crew members and transport them to their "place of final release," where they commence their time off duty. Time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty, *id.* § 21103(b)(4); rather, it is, in the parlance of the industry, "limbo time." The sole question here is whether the time spent *waiting* for deadhead transportation, after the crew has completed its duty assignment, is "time on duty," within the meaning of the Act. The Unions claim that it is; the respondents (both the railroads and the FRA) disagree.

2. As the Seventh Circuit, sitting *en banc*, unanimously held, "the statute itself resolves this issue quite

clearly." 44 F.3d at 443. That ruling gave rise to a circuit split only because a panel of the Ninth Circuit in *United Transportation Union v. Skinner*, 975 F.2d 1421 (1992), had previously interpreted the HSA in a manner contrary to the Act's text, structure, purpose, legislative history, and longstanding administrative interpretation by the FRA, the agency charged with the Act's enforcement.

3. As a diversion from the clear-cut issue of statutory interpretation presented here, the Unions argue that giving effect to Congress's clear intent will make America's railroads less safe and that therefore waiting time should be deducted from the Act's 12-hour maximum—an argument better directed to Congress than to this Court. Moreover, the Unions have constructed their "safety" argument by piling inference upon inference and by ignoring the extensive empirical evidence demonstrating that railroading is a safe industry, that the industry's safety record is continuing to improve, and that the Act's longstanding interpretation, as recently reaffirmed by the Seventh Circuit, presents not the slightest threat to that progress.

ARGUMENT

I. THE STATUTE ITSELF RESOLVES THIS QUESTION QUITE CLEARLY.

As the Seventh Circuit recognized, 44 F.3d at 443, this case presents a straightforward question of statutory interpretation—whether time that a train crew spends waiting for deadhead transportation is "time on duty" under the Hours of Service Act—with a straightforward answer: No.

This Court stated in *Chicago & Alton Railroad Co. v. United States*, 247 U.S. 197 (1918), that "[t]he purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Id.* at 199. As originally enacted in 1907, the

HSA limited train crews to 16 continuous hours of operating trains. Act of Mar. 4, 1907, ch. 2939, § 2, 34 Stat. 1416. The Act also imposes mandatory time off duty before employees can resume their operating duties. An employee who has worked the maximum shift must receive 10 consecutive hours off duty. 49 U.S.C. § 21103 (a)(2). And no employee can be called to duty unless he or she has received 8 continuous hours of time off duty in the preceding 24-hour interval. *Id.* § 21103 (a)(1). Case law interpreting the 1907 Act made it clear that time spent in deadhead transportation—either to or from a duty assignment—was to be treated as time *off* duty. *See, e.g., United States v. Great Northern Ry. Co.*, 285 F. 152, 152-54 (9th Cir. 1922).

In 1969 Congress amended the Act to reduce the maximum shift to 12 hours. Pub. L. No. 91-169, § 1, 83 Stat. 463 (1969) (codified as amended at 49 U.S.C. § 21103(a)(2)). It also added to the Act a sentence providing that "[t]ime spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty." 49 U.S.C. § 21103(b)(4).[4] That provision was the product of a compromise between labor, which wanted to amend the Act to count all deadheading as "time on duty," and industry, which wanted to continue treating all deadheading as "time off duty." *See, e.g., Hours of Service Act Amendments of 1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 76 (1969) [hereinafter *1969 House*

[4] The recodified Act is quoted *supra*. As originally enacted in 1969, the sentence read: "Time on duty . . . shall include . . . [t]ime spent in deadhead transportation by an employee to a duty assignment: *Provided*, That time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty." Pub. L. No. 91-169, § 1(b)(3)(C), 83 Stat. 463 (1969) (codified at 45 U.S.C. § 61(b)(3)(C) (1970)).

Hearings] (statement of Charles J. Coughlin, Grand Chief Engineer, Brotherhood of Locomotive Engineers); *id.* at 134-35 (statement of R.R. Manion, Vice President, Operations and Maintenance Dep't, AAR); *see also* S. Rep. No. 604, 91st Cong., 1st Sess. 5 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1638-39. As a concession to labor, time spent in deadhead transportation *to* a duty assignment was categorized as "time on duty"; as a concession to the railroads, time spent in deadhead transportation *from* a duty assignment was *not* deemed "time on duty." However, to address labor's concern that employees get a full opportunity to rest while off duty, Congress categorized deadhead transportation from duty to the place of final release as neither "time on duty" *nor* "time off duty" and instead created a third category, which came to be known as "limbo time." Thus, time spent in such transportation could not be counted against an employee's 8- or 10-hour rest period. *See* H.R. Rep. No. 469, 91st Cong., 1st Sess. 3, 7-8 (1969) (describing the committee substitute amendment which created limbo time); *see also* 115 Cong. Rec. 29,318 (1969) (statement of Rep. Staggers); *id.* at 29,320 (statement of Rep. Springer); *id.* (statement of Rep. Skubitz); *id.* at 29,321 (statement of Rep. Olsen); *id.* at 29,325-26 (statement of Rep. Pickle).

The legislative compromise worked out in 1969 was more than a matter of political convenience; it had a logic that bolstered the Act's fundamental purpose—to make railroads safer by preventing fatigued workers from operating *moving* trains. *See* 49 U.S.C. § 21103(b)(2) ("Time the [train] employee is engaged in or connected with the movement of a train is time on duty."); *id.* § 21101(5) (defining a "train employee" as "an individual engaged in or connected with the movement of a train").[5] Spend-

[5] *See also* S. Rep. No. 604, 91st Cong., 1st Sess. 2, 5 1969 (amending the House-passed bill to cover any "employee" engaged in or connected with the "movement," rather than the mere "operation," of a train), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1637.

ing several hours in deadhead transportation immediately *prior to* duty could increase the chances of crew members becoming fatigued by the latter part of their 12-hour shifts, at a time when they would still be responsible for the operation of a moving train. Counting the time spent deadheading *to* an assignment as "time on duty" therefore served the Act's purpose by ensuring that they would not be operating a train more than 12 hours after reporting for duty. But crew members who have finished all of their duties and are deadheading to their place of final release present absolutely no threat to safety: all they have to do is sit (or sleep) in the deadhead transportation until it reaches its destination at the place of final release, and then go to bed. They will get a minimum of 8 or 10 hours off duty before they engage in any further activity related to the movement of a train.

Precisely the same logic applies to the time spent *waiting* for deadhead transportation to the place of final release. Once the train is tied up, and the crew has "expired" under the Act, its members are not required or expected to perform *any* further duties until *after* their next 8- or 10-hour rest period. They literally may (and often do) adjourn to a restaurant or coffee shop while awaiting the arrival of their deadhead transport.[6] Because of their complete lack of further responsibilities,[7] expired

[6] Once the expired crew members tie up the train, set the brakes, and remove the locomotive's detachable reverser handle (which is analogous to removing an automobile's transmission lever), the train is rendered immobile. It is then customary and safe to leave the train unattended, even if its engine is running.

[7] Although the expired crew is under no *duty* while waiting for deadhead transportation, if crew members were to observe an unusual circumstance that could threaten the safety of the railroad or their fellow workers (*e.g.*, an act of vandalism or a hazardous condition on a passing train), common sense would dictate that they report that observation; but the failure to do so would not subject them to discipline. *Cf. Atchison, T. & S.F. Ry. Co. v. United States*, 269 U.S. 266 (1925) (yardmaster was not an employee "on duty," within the meaning of the HSA, merely because he and

crew members' time spent waiting for deadhead transportation—like the time they spend *in* deadhead transportation—should be treated as limbo time.[8]

The legislative history of the December 1969 amendments to the Act certainly does not contradict that conclusion.[9] The compromise, described *supra*, that resulted in the creation of limbo time was not reached until *after* the House committee held its hearings. For that reason, the Unions' citation to the July 1969 House testimony of Mr. R.R. Manion, *amicus* AAR's then-vice president for operations and maintenance, is entirely inapposite. Mr. Manion was testifying against an early, union-endorsed version of H.R. 8449 which would have included as time on duty "[t]ime spent in deadhead transportation by an

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a tower man engaged in occasional telephone conversations about the movement of freight cars to and from a yard).

[8] Because the Unions' brief ignores this point, it confuses two entirely distinct categories of time: time spent in, or waiting for, deadhead transportation from duty to the place of final release, which is governed by 49 U.S.C. § 21103(b)(4); and "interim period[s] available for rest at a place other than a designated terminal," which are governed by *id.* §§ 21103(b)(5) and 21101(1). By definition, an "*interim* period," *id.* § 21103(b)(5) (emphasis added), is a period of time sandwiched between two periods of time on duty; immediately before *and after* an *interim* period, the crew is engaged in the movement of a train. By contrast, time spent in, or waiting for, deadhead transportation is followed by time *off* duty and therefore bears no direct effect on the safe movement of a train.

[9] The legislative history of the 1969 amendments shows that the 91st Congress understood time spent waiting for deadhead transportation—like time spent in deadhead transportation—to be time *off* duty under the version of the Act that had been in effect since 1907. *See, e.g., 1969 House Hearings*, at 114-15 (statement of Charles J. Coughlin, Grand Chief Engineer, Brotherhood of Locomotive Engineers); *see also id.* at 134 (Statement of R. R. Manion, Vice President, Operations and Maintenance Dep't, AAR) ("Under established interpretations of the existing hours-of-service law, deadhead time is not considered to be time on duty, and time so spent is not governed by the 16-hour limit.").

employee to *or from* duty assignment." H.R. 8449, 91st Cong., 1st Sess. § 1(b)(3)(C) (1969) (emphasis added), *reprinted in 1969 House Hearings*, at 2; *see also 1969 House Hearings*, at 134-35 (statement of R.R. Manion, Vice President, Operations and Maintenance Dep't, AAR) (criticizing H.R. 8449 because it would designate *all* deadheading as "time on duty"). The point Mr. Manion made at the 1969 House hearing—that if a crew expired "in the country" (*i.e.*, not at a designated terminal) the railroad would be violating the Act merely by deadheading the crew to its place of final release—was undeniably true (and indeed, rather obvious) under the terms of H.R. 8449, as it was then drafted. But Mr. Manion's point is entirely irrelevant to the proper interpretation of the 1969 amendments as Congress actually enacted them.[10]

Moreover, when taken as a whole, Mr. Manion's testimony clearly supports the Seventh Circuit's interpretation. He explained to the House committee that railroad operations would suffer greatly if deadheading from a work assignment were considered time on duty because "the crew [members could not] be transported at all in any direction upon the expiration of the maximum time limit"; thus, the Act as so amended would require the railroad "to leave them where they are, perhaps in open country, perhaps in bad weather." *Id.* at 134. The House, con-

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[10] The Unions' brief makes much of the fact that § 1(b)(3)(A) of H.R. 8449, which Mr. Manion discussed in his testimony, *was* enacted without amendment. *See* Br. for Pet'rs, at 20-21. Their argument is misguided for two reasons. First, § 1(b)(3)(A) of the bill, now codified at 49 U.S.C. § 21103(b)(5), concerns "[a]n interim period available for rest at a place other than a designated terminal," which, as explained *supra* at note 8, is entirely irrelevant to the question presented in this case. Second, that section of the Act *was* effectively amended in 1978 by the passage of Public Law No. 95-574, § 6, 92 Stat. 2461, which resolved a circuit split (*compare United States v. Atchison, T. & S.F. Ry. Co.*, 525 F.2d 1184 (9th Cir. 1975), *cert. denied*, 425 U.S. 992 (1976), *with United States v. St. Louis-S.F. Ry. Co.*, 572 F.2d 1224 (8th Cir.) (per curiam), *cert. dismissed*, 439 U.S. 973 (1978)) by statutorily defining the term "designated terminal."

sistent with Mr. Manion's description of the impracticality of labor's position, refused to designate deadheading from a work assignment as time on duty when it amended the Act later in 1969. The absence of any legislative history to support the Unions' interpretation of those amendments is only underscored by their willingness to cite Mr. Manion's testimony entirely out of context. *See* Br. for Pet'rs, at 20-21.

Following the compromise of 1969, the FRA took the position that when crew members are relieved of all train-operating responsibilities but must await the arrival of deadhead transportation to their place of final release, the time spent waiting should be classified as limbo time. *See, e.g.*, Pet. App. 34a-41a (Letter from FRA Assistant Chief Counsel Gregory B. McBride to Lawrence M. Mann (Aug. 4, 1989)). The FRA recognized that classifying such waiting time as "time on duty" would not enhance railroad safety, because the expired crew members will not perform any further operating duties until they have had their statutorily-mandated period of rest; hence, any temporary fatigue would pose no danger. *Id.* at 37a.

Beginning in the 1970s unions representing locomotive engineers and other crew members lobbied Congress for further reductions in the 12-hour maximum,[11] but their

[11] *See, e.g.*, H.R. 8365, 95th Cong., 1st Sess. (1977), *reprinted in Railroad Safety Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 10-11 (1978) (amending the Act to reduce its 12-hour maximum for time on duty immediately to 10 hours and, after a two-year transitional period, to 8 hours); U.S. General Accounting Office, GAO/RCED-92-133, Railroad Safety: Engineer Work Shift Length and Schedule Variability 3-4 (1992) ("BLE [(the Brotherhood of Locomotive Engineers)] supports changes to the act, including reducing the maximum allowable work period from 12 to 10 hours . . . ."); *Rail Safety: GAO Report Predicts Only Minor Impact of 12-Hour Shift Limit On Accident Rate*, O.S.H. Daily (BNA), June 22, 1992 ("The Brotherhood of Locomotive Engineers has lobbied Congress to reduce the maximum 12-hour shifts . . . ."); *Leave Hours of Service*

efforts were rebuffed. With the prospects for a statutory amendment looking dim, the unions turned to the courts. They filed lawsuits in Oregon and California challenging the FRA's two-decade-old interpretation of the Act. If waiting time were deemed time on duty, rather than limbo time, no railroad could risk running a crew up to the 12-hour maximum unless it was certain that a deadhead transport would be waiting at the precise time and place where the crew would expire; if the railroad miscalculated, it would be subject to civil penalties ranging from $500 to $10,000 per violation. *See* 49 U.S.C. § 21303(a). Thus, by obtaining a court ruling that reclassified waiting time as "time on duty," the unions sought effectively to undermine the statutory 12-hour maximum.

On appeal from the Oregon and California decisions, a panel of the Ninth Circuit held that time spent waiting for deadhead transportation should count against (and thus effectively reduce) the Act's 12-hour rule, rather than counting as limbo time. *See United Transp. Union v. Skinner*, 975 F.2d at 1422. The Ninth Circuit's decision was unprecedented: prior to the Oregon and California cases, no court had ever called into question the FRA's policy of treating waiting time as limbo time.[12] Judge Reinhardt's opinion for the panel apparently rested on the hypothetical possibility that a railroad *could* impose additional duties on expired crew members while they awaited transportation. *Id.* at 1423-24, 1426, 1428. Although the

Act Intact, GAO Tells Congress, US Rail News, June 24, 1992 (quoting Leroy Jones, Vice President and National Legislative Representative for the Brotherhood of Locomotive Engineers) ("BLE has pressed for 10-hour work days"). The unions have proposed these reductions in the Act's 12-hour maximum even while recognizing that such changes "would 'cripple' the industry." *Locomotive Engineers President Advocates Legislative Reforms to Improve Rail Safety*, Daily Labor Report No. 73 (BNA), Apr. 16, 1986, at A-3 (quoting BLE President John F. Sytsma's statement at a meeting with reporters).

[12] *United States v. Pennsylvania Railroad Co.*, 275 F. Supp. 345 (W.D. Pa. 1967), is irrelevant here because it predated the 1969 amendments which created limbo time.

FRA continued to disagree with the Ninth Circuit's rationale, it decided to apply the court's ruling nationwide, to ensure "uniform application of the Act." 58 Fed. Reg. 18,164 (1993). Thus, through a combination of the Ninth Circuit's judicial activism and the FRA's administrative acquiescence, the unions won the victory that had eluded them in Congress: reduction of the Act's 12-hour rule.

II. THE UNIONS' "SAFETY" ARGUMENT IS INSUPPORTABLE.

Given the tenuousness of their legal position, it is not surprising that the Unions attempt to divert this Court's attention from the rather simple question of statutory interpretation presented here. They claim that the Seventh Circuit's decision implicates a "serious safety issue," yet the extra-record evidence they cite has little to do with the status of "waiting time" under the HSA. Furthermore, the Unions' "safety" argument ignores the extensive empirical evidence demonstrating that railroading is a safe industry, that the industry's safety record is continuing to improve, and that the Act's longstanding interpretation, as recently reaffirmed by the Seventh Circuit, presents no threat to that progress.

A. The Railroad Industry Has an Exemplary Safety Record.

Contrary to the impression left by the Unions' brief, *see* Br. for Pet'rs, at 29-37, railroading is a safe industry. Statistics from the United States Department of Labor show that railroad employees have lower rates of occupational injury and illness than workers in the trucking, air transportation, construction, and manufacturing industries. *See* National Safety Council, *Accident Facts* 44-48 (1994 ed.) (citing Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Injuries and Illnesses in the United States By Industry, 1992* (1994)). Moreover, the railroads' safety record has improved dramatically in recent years. Since 1981 the amount of freight carried by rail

has grown, yet the train accident rate and the employee injury rate have both been cut in half. In 1981 there were 8.25 train accidents per million train miles; by 1994, that figure had dropped to 3.82. *See* FRA Accident/Incident Bulletin Nos. 150-163, Tables S11, S50, 1, 7, 13, 16. During the same period, the on-duty employee injury rate fell from 10.08 injuries per 200,000 person-hours to 5.06 injuries. *See* FRA Accident/Incident Bulletin Nos. 154, 161, 163, Tables 1, 9. These improvements have resulted from a combination of factors, including technological advances in the design of freight cars, wheels, and devices for inspecting the rails, as well as other developments arising from research conducted at *amicus* AAR's Transportation Technology Center in Colorado; the capital expenditures in excess of $50 billion that freight railroads have spent since 1980 to improve track, signals, equipment, and information systems; and the railroads' continuing compliance with the HSA. *See* Economics, Policy and Statistics Dep't, AAR, *Railroad Facts* 43 (1994 ed.); Economics, Policy and Statistics Dep't, AAR, *Railroad Facts* 55 (1989 ed.); U.S. General Accounting Office, GAO/RCED-92-133, Railroad Safety: Engineer Work Shift Length and Schedule Variability 2 (1992) [hereinafter GAO 1992 Report] (estimating that 99.4% of the time, engineers were given at least 10 hours off duty following a work period of 12 or more hours,[13] and failing to find a single instance in which an engineer spent fewer than 8 hours off duty in any 24-hour period). Thus, the Unions' description of the railroad industry more closely resembles a nineteenth-century caricature than a fair portrayal of current reality.

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[13] A "work period" includes not only time on duty, but also time spent waiting for deadhead transportation and time spent in deadhead transportation from a duty assignment to the place of final release. Therefore, a work period may exceed 12 hours even though the railroad fully complied with the HSA and the employee spent less than 12 consecutive hours on duty.

B. The Mechanics and Economics of Train-Crew Work Schedules.

The Unions' brief not only obscures the railroads' excellent safety record; it also relies on irrelevant literature about "victims of chronic sleep deprivation," Br. for Pet'rs, at 11, which has nothing to do with the only issue presented here: whether time spent waiting for deadhead transportation is "time on duty" under the HSA. Upon closer examination, it turns out that the relationship between the designation of waiting time under the HSA and sleep deprivation is nonexistent. To understand why, one must first understand how railroads schedule their train crews.

At the outset one must distinguish yard operations from mainline (or road) operations. Yard tracks are located within defined limits inside a terminal and are used primarily for making up or breaking up trains and for storing cars. Train movements on yard tracks are authorized by yardmasters, and yard crews typically have fixed work schedules with shifts that start at the same time each day, not unlike employees in other industries. Mainline tracks, which generally carry traffic from one terminal to another, consist of tracks on which trains operate under authority of a train dispatcher. The times of operation of some mainline trains, however, can be unpredictable, as they may not be determined long in advance of departure. For example, shippers often elect to "release" a train not at any preordained hour, but rather at the moment when its cargo is fully loaded (*e.g.*, in the case of a unit-coal or unit-container train). Mainline operations—not yard operations—are at issue here.

Because of the distances covered in mainline operations, and because employees must adhere to the schedules of the trains and not vice versa, there is an inherent limit on how regular a mainline crew's schedule can be. To deal with the inherent irregularity of employees' schedules, railroads use "crew-calling systems" that notify their engineers [14] to come to work at specific times. Most mainline engineers are assigned to a "pool" from which an eligible engineer is selected for each train that is ready for operation. Each pool covers a specific territory or type of service. When the train dispatcher or yardmaster authorizes a train to run, he notifies the crew caller, who in turn selects an engineer from the top of the relevant pool list. Selection from the pool is structured to comply both with the rules promulgated under any applicable collective bargaining agreement and with the provisions of the HSA. Of course, under the latter, engineers are not eligible for selection from the pool unless they have had (a) at least 8 consecutive hours off duty during the prior 24 hours, and (b) at least 10 consecutive hours off duty since their previous shift, if that previous shift included the full 12 hours of time on duty allowed by the Act.

Typically, the engineer is notified at least 1 to 3 hours before the train's authorized departure time. Railroads have gone to considerable lengths to increase the certainty of engineers' work schedules. In addition to the fact that engineers know that they are statutorily entitled to either 8 or 10 consecutive hours of rest (depending on the length of their previous time on duty), crew-calling systems provide the engineers with information about anticipated train schedules and pool lists, which help them to predict the likely starting time of their next shift and to plan their personal activities (including sleep) accordingly.[15] A recent study by the United States General Accounting Office (GAO) found that "[t]hese systems enable

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[14] For illustrative purposes, we speak here of engineers, but the same reasoning applies to other operating employees covered by the HSA because their schedules are identical in all relevant respects to engineers.

[15] Depending on the railroad, engineers learn this information by speaking directly with a crew caller, by accessing a specialized database on a computer terminal, or by telephoning a computerized, voice-automated data system.

engineers to generally predict their next work shift at least 8 to 12 hours prior to reporting." U.S. General Accounting Office, GAO/RCED-93-160BR, Railroad Safety: Human Factor Accidents and Issues Affecting Engineer Work Schedules 3 (1993) [hereinafter GAO 1993 Report].[16]

Merely describing the crew-calling systems and the mandates of the HSA could leave an inaccurate impression of the typical work schedule of a mainline crew member. *See, e.g.*, Br. for Pet'rs, at 12 (highlighting the hypothetical possibility that a crew could work 112 hours per week under the Act). The typical crew member does *not* continually cycle through 12-hour periods of work, followed by 10-hour periods of rest. Rather, the 12-hour limit set by the HSA is an outer bound that has no effect on the vast majority of train employee shifts. *See* GAO 1992 Report, at 18 (estimating that only 3.1% of all engineers' work periods, including time spent waiting for and time spent in deadhead transportation, exceed 12 hours);[17] *see also id.* at 4 (although the Act in theory would allow engineers to work consecutive 8-hour-on, 8-hour-off cycles for extended periods, GAO found no evidence of that actually occurring). The HSA, as amended in 1969, expressly provides that its 12-hour provision is a "maximum" and that "[s]horter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees." 49 U.S.C. § 21107.[18] Furthermore, engineers

[16] In addition to the "pool engineers" described *supra*, there are "extra board" engineers who fill in for their colleagues when the latter are unable to work due to illness, vacation, personal days, or other reasons.

[17] Because GAO's estimate was based on a probability sample of 1990 work schedules for 124 engineers employed by four railroads, its conclusions may not be generalizable to all engineers, working for all railroads, in all time periods. *See id.* at 17-18.

[18] The Senate report for the 1969 amendments explained that "this section should not only permit but should also promote collective bargaining in the hope that further resort to legislation will not be sought by either railroad management or labor." S. Rep. No. 604, 91st Cong., 1st Sess. 10 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1642; *see also* 115 Cong. Rec. 29,321 (1969) (statement of Rep. Skubitz) ("[W]e are setting upper limits beyond which an employer or a union cannot bargain away the time of the worker. Both safety and public policy on labor practices dictate that such a limitation is proper. Below those limits the parties can go to it and hammer out any kind of an agreement they please.").

in "long pools," *i.e.*, pools that cover operations between distant terminals, are more likely to approach 12 consecutive hours on duty; but those very same engineers tend to get the longest breaks *between* work shifts because railroad labor agreements typically attempt to equalize the total monthly mileage in their pools. *See, e.g.*, J.A. 31a (referring to "monthly quotas" of 3800 or 3900 miles per engineer).

According to the GAO, approximately a quarter of all mainline engineer shifts exceed 10 or 11 hours, and approximately a quarter of the engineers work five or more shifts in a given week, which suggests that a significant fraction of mainline engineers work at least 50 hours per week. *See* GAO 1993 Report, at 18, 20. But that same study also found that the *average* shift for a mainline engineer lasted between 8 and 9 hours, and that the average "shift density" (number of shifts in a two-week period) was 7.7 (as compared with 10.0 for a regular, five-day-a-week job). *See id.* Thus, the average mainline engineer works roughly 33 to 35 hours per week. Although *amicus* would not for a moment suggest that operating a freight train is easy work, it is simply incorrect, as an empirical matter, to conclude that most engineers and crew members are overworked and sleep-deprived. On the whole, their hours may by necessity be somewhat irregular, but they are not excessive.

Furthermore, although the Act places no statutory limits on limbo time, the railroads have enormous incen-

tives to minimize the amount of time that train crews spend deadheading and waiting for deadhead transportation. First, railroads are in the business of providing timely and reliable services to shippers; the economic demands of an efficient and competitive freight system provide the railroads with ample incentive to ensure that trains and their crews do not often sit idle for extended periods of time. Second, under most collective bargaining agreements, a railroad must pay its crews while they await transportation and while they deadhead to their place of final release, even though they are performing absolutely no duties. *See* 58 Fed. Reg. 18,164 (1993) (referring to time spent awaiting deadhead transportation as "wholly unproductive time"). And third, waiting time and deadheading time delay the start of crew members' time off duty, which in turn delays the start of their next shift. A railroad that expended too much of its employees' time waiting for deadhead transportation would have to hire additional crew members to fill its pools. *See* J.A. 115.[19] Thus, aside from their interests in complying with the HSA, railroads have great *business* incentives to minimize waiting time.

C. The Relationship Between the HSA, Work Schedules, and Safety.

The Unions' brief implies that there is a causal chain that stretches from their interpretation of "time on duty" under the HSA, to changes in mainline crews' work schedules, to reduced fatigue for engineers and other crew members, to increased rail safety. *See* Br. for Pet'rs, at 11-12, 29-37. Yet they are unable to adduce solid proof for *any* link in that chain. Indeed, data gleaned from recent GAO studies shows that the argument is baseless.

In an effort to isolate the variables that contributed to what the FRA terms "human-factor-caused accidents" (as

[19] Of course, exigencies inherent to the railroading business, such as inclement weather and accidents, prevent railroads from altogether eliminating long waits for deadhead transportation.

opposed to accidents caused by mechanical, weather-related, or other factors), the GAO examined the statistical relationship between, on the one hand, the number of accidents and accident rates,[20] and, on the other hand, five distinct work-schedule characteristics: (1) the type of shift (yard or mainline); (2) the time of day; (3) the hour of the shift (*i.e.*, whether the accident occurred early or late in the engineer's shift); (4) shift density and length; and (5) the variability of the shifts' start-times.[21] The results of the GAO study are worth summarizing here for two reasons: first, they are not intuitively obvious; and second, they demonstrate the fatuousness of the Unions' argument that railroad safety could somehow be enhanced by treating as "time on duty" the time that a crew spends waiting for deadhead transportation.

First, as to the type of shift, the GAO found that, from 1989 to 1992 inclusive, railroads reported 3817 "human-factor-caused" accidents to the FRA. Only 24% of those accidents occurred on mainline track. *See* GAO 1993 Report, at 8. However, when the GAO calculated, for two railroads, the accident *rates*, *i.e.*, the number of accidents per 100,000 engineer work hours, it concluded that the rates were 7% higher for mainline shifts than for yard shifts in the case of one railroad and 17% higher for the

[20] In interpreting the GAO's data, it is important to distinguish (1) data concerning the absolute *number* of accidents (which GAO obtained from the database of all "human-factor-caused accidents" that railroads reported to the FRA between January 1, 1989, and December 31, 1992), and (2) data concerning the accident *rate*, which GAO calculated as accidents per 100,000 engineer work hours. Generally, statistics reflecting accident rates, rather than the raw number of accidents, are most useful in estimating the causes of accidents; but the GAO's accident rate data is based on random samples from particular railroads and therefore may not be generalizable to all railroads. *See* GAO 1993 Report, at 2 & n.4; GAO 1992 Report, at 1-2 & n.2.

[21] The GAO acknowledged that other factors (*e.g.*, training, experience, traffic conditions, and the type and complexity of a route) could also contribute to accidents, *see* GAO 1992 Report, at 3, but only the work-schedule characteristics studied by the GAO could be relevant to the legal issue presented here.

second railroad. *See id.* at 13. Of course, even the Unions do not contend here that the designation under the HSA of time spent waiting for deadhead transportation will have any appreciable effect on the relative balance of yard versus mainline work. Therefore, the type of shift (yard versus mainline) is a work characteristic with no direct bearing on the question at hand.

Second, as for time of day, 38.8% of all mainline accidents from 1989 to 1992 took place between 10:00 a.m. and 6:00 p.m., more than took place during any other eight-hour block of time. *See* GAO 1993 Report, at 12. That statistic, however, apparently follows from the fact that more trains are running during those hours. When GAO examined the accident *rates* for two specific railroads, it found that the rates were slightly higher during the non-daylight hours (6:00 p.m. to 6:00 a.m.) for one railroad; the other railroad showed no consistent pattern. *See id.* at 13-15; *see also* GAO 1992 Report, at 3 (estimating that the accident rates for four railroads in 1990 were highest between 2:00 a.m. and 6:00 a.m.). However, the time of day that a train is operating has much to do with the demands that shippers place on the railroads and little or nothing to do with the proper designation of waiting time under the HSA.

Third, and more significantly, over 95% of the human-factor-caused accidents reported to the FRA occurred *before* an engineer had worked 10 hours in a shift. *See* GAO 1993 Report, at 8. More than three-quarters of the accidents occurred in the second through eighth hours of a shift. *See id.* at 9-11. Only 2.3% of all mainline accidents occurred after an engineer had worked 11 hours in a shift. *See id.* at 11. When GAO analyzed accident *rates* by the hour of the engineer's shift, the results were entirely ambiguous: The highest rates for one railroad were found in the second, third, fourth, fifth, and eleventh hours of the shifts; for the other railroad, in the first, second, sixth, ninth, and twelfth hours. *See id.* at 15-16. Understandably, the GAO concluded that its "findings do not indicate one way or another if accidents are more

likely to happen later in the engineer's shift." *Id.* at 15. Unlike the yard-vs.-mainline and time-of-day characteristics discussed *supra*, the GAO's findings as to the hour of the shift *are* relevant here: but the evidence simply does not indicate that any safety advantage would accrue if the Unions were successful in achieving through judicial intervention what they have failed to achieve through the legislative process—lowering the Act's 12-hour maximum time on duty.

Fourth, the GAO study showed that shift density and shift length—defined here as the number and length of shifts worked in the previous two-week period—had little correlation with accident rates. In one railroad, the engineers who had been involved in an accident had, on average, precisely the same number of starts in the two weeks leading up to the accident as the engineers whose records were accident-free. *See id.* at 18. Interestingly, the engineers who had accidents actually had a *shorter* average shift length during the two-week period than the engineers without accidents. *See id.* In the other railroad, the engineers who had been involved in an accident had almost exactly the same average shift length as their fellow engineers, but the engineers with accidents averaged 8.8 starts in the previous two weeks, while their colleagues had only 7.8 starts. *See id.* Again, the results are ambiguous: they suggest (albeit rather weakly) that accident rates could be improved by reducing the number of shifts per week and *increasing* the average length of each shift. Those findings, however, *undermine* the Unions' argument here. Considering time spent waiting for deadhead transportation as "time on duty" rather than limbo time would tend, on average, to *shorten* the length of shifts (because waiting time will have to be deducted from the current 12-hour maximum of time on duty) and to *increase* shift density (because reducing limbo time would tend to decrease the amount of time between shift starts). Thus, GAO's data on shift density and length suggest that the Unions' interpretation of the HSA could have a *negative* impact on railroad safety.

The fifth and final work-schedule characteristic analyzed by the GAO was "shift variability," a measure of the change in start times from one work shift to the next.[22] As explained *supra*, variability is much higher for mainline shifts than for yard shifts because most yard employees have regular schedules that begin at the same time every day. *See id.* at 20. As for mainline employees, the results of the GAO study were not conclusive. For one of the two railroads studied by GAO, there was no clear relationship between accident rates and variability. For the other railroad, mainline shifts that resulted in accidents had an average variability of 6.6 hours, while mainline shifts in general had an average variability of only 4.7 hours. *See id.* at 20-21. GAO hypothesized that, for that one particular railroad, during the period studied, shift variability may have had some "link[] to engineer fatigue and possibly to human-factor-caused accidents." *Id.* at 21.

It is not at all clear, however, that designating time spent waiting for deadhead transportation as "time on duty" would reduce variability. As explained *supra*, such a designation would effectively reduce the Act's 12-hour maximum. In 1992 Congress asked the GAO to analyze the Brotherhood of Locomotive Engineers' proposal to amend the Act by reducing the 12-hour maximum to 10 hours. The GAO concluded that such an amendment could actually "*increase* the variability . . . of engineers' work cycles, . . . [which] could, in turn, increase fatigue for engineers." GAO 1992 Report, at 2 (emphasis added); *see also id.* at 10-11.

That conclusion is correct because the current statutorily-mandated periods—a 12-hour maximum period of time on duty, followed by a brief period of limbo time and then a 10-hour minimum period of time off duty—

[22] For example, a train employee's initial shift in a work period might start at 8:00 a.m. If the next shift starts at 7:00 a.m. (or at 9:00 a.m.), the variability of the second shift would be one hour. By definition, the maximum variability possible from one shift to the next is 12 hours.

readily lend themselves to a 24-hour cycle. For example, a crew might begin its duty assignment at 8:00 a.m. on a Monday morning, expire at 8:00 p.m., wait for deadhead transportation (either on the train or at a nearby cafe) until 8:15 or 8:30 p.m., reach its place of final release (via a deadhead van or other transport) at 10:00 p.m., and enjoy time off duty until 8:00 on Tuesday morning—the same time of day that it began its previous shift. Under that scenario, the crew's shift variability is zero because the 12 hours on duty plus the 10 hours off duty plus 2 hours of deadheading and waiting time add up to 24 hours. If the waiting time and time spent in deadhead transportation were only an hour, the crew might begin work at 8:00 a.m. on Monday, 7:00 a.m. on Tuesday, and 6:00 a.m. on Wednesday—an average shift variability of one hour. Shortening the 12-hour maximum—which would be the effective result of adopting the HSA interpretation urged here by the Unions—would tend to *increase* shift variability by making the full work/rest cycle too short to correspond to a 24-hour day.[23] That

[23] As noted *supra*, the GAO found, for one railroad, that the variability of mainline engineer shifts that resulted in accidents averaged just over 6½ hours. Such a high level of variability cannot possibly be attributed to the HSA, no matter how it is interpreted; rather, it can only be explained as a function of the irregularity of schedules for mainline trains. An engineer whose shift variability averages 6½ hours is getting either considerably less than 12 consecutive hours of time on duty or considerably more than 10 consecutive hours of time off duty, and hence his work schedule is not directly shaped by application of the provisions of the HSA. If the engineer reported for duty on Monday morning at 8:00 a.m., his Tuesday shift would have to begin either at 1:30 a.m. or at 2:30 p.m. in order to have 6½ hours of variability. On the one hand, if his Tuesday shift starts at 1:30 a.m., then his time off duty began no later than 5:30 p.m. on Monday (to allow for the Act's mandatory 8-hour rest period), and therefore his Monday tour of duty (which began at 8:00 a.m.) could have been no more than 9½ hours long—far less than the 12-hour maximum under the Act. On the other hand, if his Tuesday shift starts at 2:30 p.m., even if he worked a full 12 hours of time on duty on Monday (thus finishing up at 8:00 p.m.), he would have had 18½

result would not serve to foster the recent progress that railroads have been making in operational safety. Thus, the Unions' "safety" arguments are entirely baseless.

Moreover, at bottom the Unions' arguments call for the legislative amendment—and not merely the judicial reinterpretation—of the Act. Those arguments "are addressed in vain to this Court. Their proper theatre is the halls of Congress . . . ." *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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hours of limbo time plus time off duty before returning to work. Because 8½-hour periods of limbo time are virtually unheard of, the engineer would in all probability have had far more than the statutory minimum of 10 hours of time off duty. Thus, any train crew member who is averaging 6½ hours of shift variability is clearly doing so because of the demands placed on his schedule by the nature of the railroading business, *see supra* Point II.B.—not because of the application of the HSA.